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No. 92-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fourth District

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, consistent with the First and Fourteenth Amendments to the United States Constitution, the State of Florida may punish a reporter for publishing portions of a widely disseminated court order which the reporter lawfully obtained.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
INDEX TO APPENDIX	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Statement Of Facts	3
B. The Proceedings Below	10
C. How The Federal Question Was Presented	15
REASON FOR GRANTING THE WRIT	20
The First and Fourteenth Amendments To The United States Constitution Forbid The State Of Florida From Punishing A Journalist For Reporting The Contents Of A Widely Disseminated Court Order	20
A. This Court's Recent Decision In *Florida Star* Commands Reversal Of The Decision Below	21
1. The Statute at Issue Places an Affirmative Duty on Government Employees to Shield Confidential Documents and Cannot Be Used as a Governmental Sword to Punish a Reporter when those Employees Disregard their Duties	23
2. The Interests at Stake in *Florida Star* Were Far More Compelling than the Interest at Stake Below	26

3. No State Interest "Of the Highest Order" May Be Credibly Asserted Where Threats to that Interest Go Unpunished and Ignored 28

B. Fundamental Constitutional Interests Are Seriously Threatened When A State Prosecutes A Reporter For His Truthful Publication Of A Widely Disseminated, Unsealed Order 29

TABLE OF AUTHORITIES

Cases	Page
Branzburg v. Hayes, 408 U.S. 665 (1972)	19
Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374 (Fla. 1989)	25
Cape Publications, Inc. v. Hitchner, 514 So. 2d 1136 (Fla. Dist. Ct. App. 1987), *rev'd*, 549 So. 2d 1374 (Fla. 1989)	26
Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991)	19,30
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	21,30
Easton Publishing Co. v. Boettger, 493 U.S. 885 (1989)	21
First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)	30
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)	27
Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980)	25
In re Adoption of H.Y.T., 458 So. 2d 1127 (Fla. 1984)	17
In re Grand Jury Proceedings, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd*, 963 F.2d 567 (3d Cir. 1992) (*en banc*)	19
In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987)	19
In re Investigation: Florida Statute 27.04, Subpoena of Roche, 589 So. 2d 978 (Fla. Dist. Ct. App. 1991)	1
In re Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976)	14
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	21,23

Table of Authorities Continued

	Page
Lewis v. United States, 517 F.2d 236 (9th Cir. 1975)	19
Mayer v. State, 523 So. 2d 1171 (Fla. Dist. Ct. App. 1988)	17,25
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	29
Morgan v. State, 337 So. 2d 951 (Fla. 1976)	16,29
NAACP v. Button, 371 U.S. 415 (1963)	30
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)	25,30
Newton v. National Broadcasting Co., 109 F.R.D. 522 (D. Nev. 1985)	19
Norris v. Alabama, 294 U.S. 587 (1935)	20
Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977)	21
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	30
Shillitani v. United States, 384 U.S. 364 (1966)	14
Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991)	27,29
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)	*passim*
Texas v. Johnson, 491 U.S. 397 (1989)	27
The Florida Star v. B.J.F., 491 U.S. 524 (1989)	*passim*
The Florida Star v. B.J.F., 499 So. 2d 883 (Fla. Dist. Ct. App. 1986), *review denied*, 509 So. 2d 1117 (Fla. 1987), *rev'd*, 491 U.S. 514 (1989)	18
Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986)	16
United States v. Lopez, 1987 U.S. Dist. LEXIS 11115 (E.D. Ill. 1987)	19

Table of Authorities Continued

Page

Constitutional Provisions

U.S. Const. amend. I ..... *passim*
U.S. Const. amend. XIV 2,28

Statutes

Fla. Stat. Ann.
§ 24.108(7)(b) (West 1991) 25
§ 39.411 (West 1988) ..... *passim*
§ 119.07 (West 1991) 16
§ 370.07(6)(a) (West 1992) 17
§ 415.502(14)(c) (West 1992) 26
§ 794.03 (West 1992) 17

28 U.S.C.
§ 1257(a) 2

Letters, Essays & Literature

B. Franklin, *Autobiography* (H. Weld. ed. 1848) ... 20
B. Franklin, *Poor Richard's Almanack* (1735) 25
Thomas Jefferson: Writings (1984) 20
J. Milton, *Paradise Lost* (1667) 18
T. Paine, *The Age of Reason* (1795) 30

Opinions

Op. Fla. Att'y Gen. No. 91-32 (May 14, 1991) 23

Law Reviews

S.J. Ervin, *In Pursuit of a Press Privilege*, 11 Harv. J. on Legis. 233 (1974) 20
Note, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450 (1985) ... 19

Table of Authorities Continued

Page

Miscellaneous Materials

P. Long, "Stuart reporter may go to jail over source," *The Miami Herald*, June 5, 1992, at § 8, at 4 14

N.Y.L. Revision Comm'n, *Report, Recommendations & Studies* (1949) 20

T. Roche, "Judge's custody ruling secret," *The Stuart News*, July 14, 1990, at A1 27

INDEX TO APPENDIX

In re Investigation: Florida Statute 27,04, Subpoena of Roche, 599 So. 2d 1279 (Fla. 1992) 1a

In re Investigation: Florida Statute 27.04, Subpoena of Roche, 589 So. 2d 978 (Fla. Dist. Ct. App. 1991) 3a

Order of the Circuit Court for the 19th Judicial Circuit (Oct. 20, 1990) 10a

Florida Statutes Annotated § 39.411 ..... 16a

Florida Department of Health and Rehabilitative Services Memorandum (April 25, 1989) 18a

Affidavit of Jane Doe, Charlotte May Puffinberger's Foster Parent (Feb. 4, 1992) 26a

News articles published by *The Stuart News* and *The Palm Beach Post* (June 1989-May 1990) .. 34a

Investigative Report, Office of the State Attorney (19th Judicial Circuit) 55a

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No. 92-_____

TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioner, Tim Roche, respectfully prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Fourth District, in the case captioned *In re Investigation: Florida Statute 27.04, Subpoena of Roche*, 589 So. 2d 978 (Fla. Dist. Ct. App. 1991).

OPINIONS BELOW

The order of the Supreme Court of Florida declining, by a 4-3 vote, to review the decision of the Fourth District Court of Appeal, is reported at 599 So. 2d 1279 (Fla. 1992) and is reprinted at 1a.[1] The decision below is reported at 589 So. 2d 978, and is reprinted at 3a. The trial court order finding Petitioner in contempt of court is not reported, but is reprinted at 10a.

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[1] References to the Appendix are designated as "___ a." References to the record are designated as "R ___."

JURISDICTION

On June 2, 1992, a divided Supreme Court of Florida entered an order denying discretionary review of an appellate court judgment affirming Petitioner's conviction for contempt. *See* 1a. This Petition is being docketed within 90 days from entry of that order, and in accordance with Justice Kennedy's Order of July 22, 1992 granting Petitioner's Application for Stay. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fourteenth Amendment, United States Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Florida Statutes § 39.411 (West 1988):

* * *

> (3) The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, subject to the provisions of s. 63.162, a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any

official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the court may deem proper, and may punish by contempt proceedings any violation of those conditions.

(4) All information obtained pursuant to this part in the discharge of official duty by any judge, employee of the court, authorized agent of the department, or law enforcement agent shall be confidential and shall not be disclosed to anyone other than the authorized personnel of the court, the department and its designees, law enforcement agents, and others entitled under this chapter to receive that information, except upon order of the court.

(5) All orders of the court entered pursuant to this chapter shall be in writing and signed by the judge, except that the clerk or deputy clerk may sign a summons or notice to appear.

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner, Tim Roche, is a reporter for *The Stuart News*, a newspaper of general circulation serving Stuart and the surrounding towns and cities of Martin and St. Lucie Counties in southeast Florida. Petitioner covers civil and criminal proceedings in the Martin County courts. Among the news events he covered extensively in 1989 and 1990 was the unfolding story of the death of a three-year-old girl, the prosecution of her parents for child abuse, and the court-ordered termination of her mother's parental rights to her surviving sister.

For his attempt to chronicle the final event of this tragedy truthfully, Petitioner now faces incarceration in the Martin County jail.

The events underlying this Petition began on November 22, 1988, when three-year-old Crystal Lynn McGrath was tortured and beaten at the home of her mother, Cheryl Puffinberger, and her stepfather, Carl Puffinberger. She died from massive internal injuries the following morning at a local hospital.[2]

In January 1989, Carl and Cheryl Puffinberger were arrested on aggravated child abuse charges. (The couple's only natural child, four-month-old Charlotte May, had been removed from their custody and made a ward of the State immediately following Crystal's death. *See* Affidavit of Jane Doe, Charlotte May's Foster Parent, reprinted at 26a). Carl Puffinberger was later sentenced to ten years in state prison for aggravated child abuse, while Cheryl Puffinberger pleaded no contest to neglect charges based on her failure to report the violence against Crystal and received a nine-month jail term.[3]

In early 1990, Cheryl Puffinberger sought to regain custody of Charlotte May, while HRS sought to terminate her parental rights. At the same time, Charlotte May's foster mother, convinced that returning the child to her mother

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[2] Reports that Crystal was being abused were first made to Florida's Department of Health and Rehabilitative Services ("HRS") in June 1988. *See* Attachment to Memorandum from Gerald D. Slavens to G. Peter Digre (April 25, 1989), reprinted at 18a, 19a. It was only after she died that a review of HRS records revealed that the social worker assigned to Crystal's case had not observed her after July. *Id.* at 18a. In March 1989, as a result of pressure prompted by public outrage, HRS formalized its procedures for reviewing child abuse cases. *Id.* at 25a.

[3] Murder charges were not filed because the State Attorney was unable to determine which parent dealt the fatal blows. *See* 41a.

"could [have] result[ed] in endangering her," became concerned that "nothing was being done by state [HRS] officials to prepare for the [termination] hearing," and that, without public pressure, Charlotte May's case would not get "the priority it warranted." *See* 27a-28a. By the time the termination proceedings began, public interest in Charlotte May's welfare was intense.[4] Neither of Charlotte May's parents sought to shield their acrimonious custody fight with the State from public scrutiny. Indeed, just four days before the termination proceedings were to begin, Cheryl Puffinberger granted interviews. *See, e.g.*, T. Roche, "Fight for kid begins," *The Stuart News*, May 18, 1990, reprinted at 40a; J. Taylor, "Mother who watched beatings wants daughter," *The Palm Beach Post*, May 18, 1990, reprinted at 44a. Carl Puffinberger—who relinquished his parental rights on the morning the proceedings began—also granted an interview from prison.

On May 29, 1990, after a two-day hearing, The Honorable Paul Kanarek entered an order ("the Termination Order") terminating Cheryl Puffinberger's parental rights. Pursuant to Fla. Stat. Ann. § 39.411, the Termination Order was to be kept separate from other judicial records by the Juvenile Court clerk, and, unlike most court records, was to be made available to the public "only upon order of the court." The Judge entered neither an order sealing the Termination Order, nor one prohibiting its publication by the Florida news media,[5] electing instead to hand it "to the Clerk," rather than just "put it in a box where someone could pick it up and look at it." *See* R7-8. Nevertheless, by the end of the day, two dozen or more people had picked up and looked at, photocopied and passed

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[4] Government officials had received, by May 1990, close to 100 letters and postcards from citizens (including President George Bush) concerned about Charlotte May's welfare. *See* 43a.

[5] Any such orders must be made in writing. *See* Fla. Stat. Ann. § 39.411(5).

around, telecopied, removed, discussed, or otherwise learned of the contents of the Termination Order. *See* 61a-105a.

The results of the hearing were widely reported by the Florida news media the next day, when public interest in the outcome was at its peak. Jill Taylor of *The Palm Beach Post*, for example, reported the gist of Judge Kanarek's decision, writing that: "Cheryl Puffinberger did not 'substantially comply' with an agreement she made with [HRS] and faces permanent loss of custody of her daughter, according to a judge's ruling Tuesday." *See* J. Taylor, "Mom loses fight for daughter," *The Palm Beach Post*, May 30, 1990, reprinted at 49a. Petitioner also summarized the ruling, and included 54 words from its approximately 10 pages of factual findings in his news article. Specifically, the article reported that the Judge had found:

- that "Mrs. Puffinberger would 'make up excuses' to hide the abuse from state social workers monitoring the case in the months before Crystal's death[,]"
- that " '[t]he evidence clearly and convincingly shows that Cheryl Puffinberger did nothing to protect Crystal McGrath from the abuse and/or neglect by Carl Puffinberger,' " and
- that " '[t]he evidence further shows that Cheryl Puffinberger permitted Charlotte Puffinberger to live in an environment which caused the child's physical, mental or emotional health to be in danger.' "

See T. Roche, "Judge decides Puffinberger unfit to raise daughter," *The Stuart News*, May 30, 1990, reprinted at 52a.[6]

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[6] The 54 words quoted by Petitioner conveyed no new or startling information to the public, except the incidental suggestion that the

On June 8, 1990, Judge Kanarek wrote to the local State Attorney, asking him to investigate "disclosure of the Court's Order and the statements made by counsel" regarding it. *See* 55a-56a. In that letter, the Judge mentioned both the news article written by Petitioner and the article written by Ms. Taylor, and expressed his concern that "the disclosure of the Court's Order and the statements made by counsel may constitute violations of Chapter 39 and as a result be punishable as indirect criminal contempt." *See* 56a.

Four days later, the State Attorney began an official inquiry. *See* Investigative Report, Office of the State Attorney (Nineteenth Judicial Circuit of Florida) ("the Report"), reprinted at 61a. As the Report reveals, the State Attorney quickly found that the supposedly confidential order had been telecopied; that it had been photocopied and disclosed to persons lacking authorization to view it; that at least one unauthorized copy had been removed from the courthouse altogether and left in a car overnight; that

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Termination Order had not been treated as confidential by government employees. In fact, the three quoted findings were based on information that already had been admitted by the parties, alleged by public officials, described in public documents, reported by newspapers and television stations, and discussed in the community. The Judge's first determination, that Cheryl Puffinberger "made up excuses" to hide Crystal's abuse, is virtually indistinguishable from her earlier admission to a *Palm Beach Post* reporter that she had "lied to the HRS worker assigned to check on Crystal, telling her everything was fine when it wasn't." *See* 45a. His second finding, that Cheryl Puffinberger had failed to "protect" Crystal from her husband, simply repeated information that had been in the public domain since she had pleaded no contest to criminal neglect charges. *See, e.g.*, T. Roche, "9-month jail term handed down in fatal abuse case," *The Stuart News*, June 6, 1989, reprinted at 34a. Finally, Judge Kanarek's understated conclusion, that Cheryl Puffinberger had allowed Charlotte May to live in a dangerous and unhealthy environment, was patently obvious. *See, e.g., id.* (reporting that she had "allow[ed] her husband to punch, kick, slap and torture" Charlotte May's sister).

a facsimile copy received by HRS was missing; and that the Order had been widely discussed. *See* 61a-105a. Just how widely the Termination Order was disseminated or discussed, or how many copies existed, or where they were, or who had seen them, however, never will be known. For, despite the apparent violations of Fla. Stat. Ann. § 39.411 by government employees, a thorough, systematic effort to discover the full extent of distribution and communication of the Termination Order was not conducted.

Instead, while disregarding obvious avenues to address the Judge's concerns, the State's investigation focused solely on "the source of the 'leaking' of the confidential order to Tim Roche of the Stuart News." Report at 101a (Affidavit of Investigator David P. Powers (Sept. 7, 1990)).

Thus, for example, though courthouse employee Tammy Franklin admitted that she had asked for, received, and taken home an unauthorized copy of the Termination Order, she was not asked whether she had shown her copy to anyone, discussed it, or made additional copies. *See* 67a. Similarly, Julie Anne Roddenberry-Sherman, a Circuit Court supervisor who lacked authorization to review the Termination Order, nevertheless was given a copy and read it. *See* 68a. Despite her admission, investigators did not ask her whether she had shared her copy, discussed it, or made additional copies. *See id.*

Juvenile Clerk Carol Tilton—who made the unauthorized copy for Ms. Franklin and permitted Ms. Roddenberry-Sherman to read the copy filed by the Judge—at first lied to investigators, telling them she had not shown the Termination Order to anyone and that "she had not xeroxed any additional copies." *See* 67a. It was only after interviews with Ms. Franklin and Ms. Roddenberry-Sherman proved these statements to be false that investigators, upon advising Ms. Tilton that she had committed perjury, learned the extent of her earlier misrepresentations. *See* 68a. No further questions were asked of her, however. *Id.*

The Report also shows that while attorneys Karen O'Brien Steger and Ron Smith were asked whether they had disclosed the contents of the Termination Order to Petitioner, they were not asked whether they had disclosed its contents or given copies to anyone else. *See* 69a. Questions posed to the attorneys' partners and staffs were similarly abbreviated. *See, e.g.*, 69a. No one from the Judge's personal staff was questioned at all.

The State's investigative efforts at HRS were even more cursory. Investigators made almost no effort to identify the person who made two copies of a facsimile received in West Palm Beach, and never did identify that person or find the missing facsimile. *See* 74a, 90a. The Report also states that several HRS employees known to have had access to the Termination Order were interviewed, *see* 89a, but, oddly, contains no information about either the subject or scope of these interviews. *See id.* Other "leaks" of concern to Judge Kanarek were not addressed at all.[7]

By the end of August, the investigation was at a standstill. On August 28, 1990, Judge Kanarek telephoned the State Attorney's office and requested that "Tim Roche be subp[oenaed] to give a statement—and upon Tim Roche's refusal—[that the State Attorney's office] apply for an order to Show Cause." *See* 100a.

Two days later, the prosecutor obliged, and served upon Petitioner an investigation subpoena commanding him to identify the person or persons who had disclosed a copy of the Termination Order to him. This would begin the

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[7] *See* Report at 94a (though investigators determined that a reporter at *The Palm Beach Post* "might have obtained the contents (but not the hard copy) of the [Termination] Order," they did not question her further after she "declined to discuss the issue of whether she had, in fact, obtained any information from any source on the date in question").

only prosecution ever initiated as a result of the investigation. No subpoenas ever were issued to court or HRS personnel, attorneys, or the parties. Statements made to reporters by counsel, which Judge Kanarek also had complained about, were neither addressed nor scrutinized.

B. The Proceedings Below.

On September 6, 1990, Petitioner moved to quash the subpoena and for a protective order. In its Memorandum in Support of Order to Show Cause, the State argued that the subpoena should not be quashed because:

> The closure of trials and the sealing of records serves the purpose of limiting sensational "newsworthy" media exposure which serves no valid public purpose. The legislature and the courts place such a high value on the protection of the rights and interests of children that they are willing to limit even the freedom of press.

See R103. Without citing any authority, the State also argued that it had a "compelling need to require Mr. Roche to reveal the source of the information" because "[t]he first amendment freedom of press must be weighed against the societal interest in protecting children. . . . The Florida Legislature adopted Chapter 39 to protect children, well-knowing that first amendment freedom of press existed, but did so because society's interest in protecting children outweigh [sic] the limited privilege." R104. In making this argument, the State confused the public's right of access to official records (to which no "privilege" applies) with Florida's qualified testimonial privilege for reporters. This confusion, as Petitioner repeatedly pointed out below, permeated—and tainted—the entire litigation of this case.

On September 18, 1990, at a hearing on Petitioner's Motion to Quash ("Motion"), the State argued not that a compelling interest would be served by forcing Petitioner

to reveal the identity of his source, but that, because Petitioner had gained access to and published portions of the Termination Order, he should be punished:

> What we have here today, Your Honor, is if we allow the press to go behind Judges' orders, to go behind the Florida Legislature and disregard Chapter 39, they simply then can violate the Judge's order at anytime they choose. Publish the order because they feel it is in society's interest to publish what the Judge said they could not. . . .
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> * * *
>
> . . . [Mr. Roche and *The Stuart News*] elected to be the ones that could flaunt it in the papers saying it was sealed but we got it anyway and we published it. . . . That is serious because it damages the children of this State.

R52-53, 59.

On October 20, 1990, The Honorable John G. Ferris denied Petitioner's Motion. Among the findings on which that decision was based were the following:

> * * *
>
> 2. . . . Tim Roche was not an authorized or designated person to *have possession* of said orders [sic].
>
> * * *
>
> 4. That there was no application to Judge Kanarek to release the report to Tim Roche or anyone on his behalf but that Roche nevertheless *obtained a copy* of the order and *printed substantial portions of it in his paper the next day.*
>
> * * *
>
> 8. Issue here is therefore joined on the provisions of the juvenile statutes along with Judge

> Kanarek's order as against the claim of Roche of the protection of the First Amendment. *Stated somewhat differently, can Roche unilaterally but deliberately violate an order of a Court of competent jurisdiction under the guise of the privilege and protection of the First Amendment*?

See 10a, 11a (emphasis added). The "order" Judge Ferris referred to in paragraph 8 did not exist. Apparently, his reference to a nonexistent order was based on his mistaken belief—prompted by the State's misrepresentations—that Judge Kanarek had issued an order sealing and prohibiting publication of the Termination Order. This misunderstanding, as well as the trial court's confusion as to what "privilege" was at issue, is reflected in Judge Ferris's statement that:

> . . . if the respondent, Roche . . . believed [that] . . . *the Kanarek order unconstitutionally violated the qualified privilege of the press under the First Amendment* and that he should not be barred from *possession* and *knowledge* of the contents of any order issued, he could immediately address his grievance to Judge Kanarek and if he received an unfavorable result, the Fourth District Court of Appeal is not distant either geographically or procedurally to address his grievance. Roche has shown no great urgency or need *to have published the prohibited story* the next day and none appears.

See 13a (emphasis added).

Thus, based on its misunderstanding of the facts and its confusion as to the law, the court held that: "the constitutional interest of Tim Roche *in his publication* of said order *well knowing that its contents prohibited it*" was "far outweighed" by "the protection of an important segment of our society" and the State's interest in "integrity

for the orders of the courts of competent jurisdiction." *See* 13a, 14a (emphasis added).

Judge Ferris then ordered Petitioner "to reveal the identity of the person who provided [him] with the order of Judge Kanarek within ten days from the date of this order." *See* 14a. At a show cause hearing on November 2, 1990, The Honorable Robert Makemson, having found that Petitioner had not complied with the Order entered October 20, 1990, found him guilty of indirect criminal contempt and sentenced him to 30 days in the Martin County Jail. R66.[8] A timely appeal was filed.

In its response to Petitioner's appeal, the State again confused two distinct areas of First Amendment jurisprudence, arguing that Petitioner had no "privilege" to obtain or publish the contents of the Termination Order, and that, as a result, he had no privilege to refuse to identify who it was that disclosed the Termination Order to him. *See, e.g.*, Answer Brief of Appellee at 15, 25. The Fourth District, equally confused, affirmed Judge Ferris's decision, holding that:

> We conclude, as did the trial judge, that the purposes served by maintaining the confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's *disclosure* of the court order involved herein and that *such action on his part was not qualifiedly privileged.*

See 9a (emphasis added). The court denied Petitioner's Motion for a Rehearing on December 27, 1991.

Petitioner never has asserted that he had a "qualified privilege" to "disclose" 54 words of the Termination Or-

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[8] The State requested that Petitioner be found guilty of indirect criminal contempt—the punishment for violations of § 39.411—and also asked that he be sentenced to six months in the Martin County Jail. R105.

der. Nor has he argued that he had a constitutionally based right of "access" to the Termination Order. Instead, Petitioner has a constitutional right, grounded in the First Amendment, to publish official information, like the Termination Order, which he lawfully obtained. The State of Florida has sought to punish him for exercising that right. As the lead prosecutor told *The Miami Herald*: "When Tim published the contents of a sealed order, he violated the law." P. Long, "Stuart reporter may go to jail over source," *The Miami Herald*, June 5, 1992, at § 8, at 4. *See* State of Florida's Response to Petitioner's Request for Waiver of Rules of Executive Clemency and Application for Executive Clemency (Aug. 6, 1992) ("State's Response") at 13 ("Mr. Roche . . . violat[ed] the law by . . . print[ing] the order . . .").[9]

On February 6, 1992, a Notice to Invoke Discretionary Jurisdiction was filed in the Supreme Court of Florida. By a vote of 4-3, the court denied discretionary review and an opportunity for a rehearing on June 2, 1992.

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[9] The State no longer can pursue enforcement of Petitioner's contempt conviction or relitigate the reporter's privilege issue. The one-year statute of limitations for violations of Fla. Stat. Ann. § 39.411 ran on May 29, 1991. As a result, the investigation into the disclosure of the Termination Order is closed and cannot be reopened. Had Petitioner's sentence truly been entered for the purpose of acquiring testimony as to the identity of his source, Florida law would require that Petitioner's sentence now be vacated. *See In re Tierney*, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976) (vacating sentence for contempt entered against reporter for her refusal to answer questions posed by a grand jury where, because she appealed, the grand jury was no longer in session); *see generally Shillitani v. United States*, 384 U.S. 364 (1966). In light of the fact that no purpose could now be served by his imprisonment, Petitioner filed an Application for Clemency to Florida's Office of Executive Clemency on July 2, 1992. In opposing that Application, the State argued, once again, that Petitioner "voluntarily violat[ed] the law" by "electing to . . . publish[]" portions of the Termination Order, and that his punishment was justified as a result. *See* State's Response at 12.

On June 5, 1992, Petitioner filed an Emergency Motion for a Stay of Mandate with the Chief Justice of the Supreme Court of Florida. That motion was granted on June 9, 1992. The stay expired at midnight on July 2, 1992. The State of Florida agreed not to jail Petitioner pending the completion and filing of an Application for Stay with this Court by July 14, 1992.

On July 14, 1992, Petitioner filed an Application for Stay to The Honorable Anthony M. Kennedy. On July 16, 1992, Justice Kennedy sought a response from the State. The Application was granted on July 22, 1992 and this Petition was timely filed.

C. How The Federal Question Was Presented.

Though seemingly litigated as a question of a news reporter's qualified privilege not to reveal the identity of a confidential source, this case was in fact adjudicated as a question of a reporter's right to publish lawfully obtained official information about a matter of widespread community concern.

As the decision below makes clear, and the arguments and out-of-court statements by State officials confirm, the State seeks to jail Petitioner for obtaining and truthfully reporting the contents of a widely disseminated, unsealed judicial order. Yet, "a penal sanction for publishing lawfully obtained, truthful information . . . requires the highest form of state interest to sustain its validity." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-02 (1979). No such interest was at stake here. In an attempt to manufacture an interest of the highest order, the State tangled two wholly separate areas of First Amendment jurisprudence. For, as the record makes clear, the State's contention all along has been not that a compelling interest would be served by forcing Petitioner to reveal his source, but, rather, that he should not have learned and reported the contents of the Termination Order.

Petitioner's initial arguments were based on Florida's unequivocal common law, which grants to reporters a privilege to refuse to identify confidential sources unless the party seeking the information has demonstrated: (1) that the reporter has relevant information, (2) that it has exhausted all other avenues for the information, *and* (3) that a compelling interest will be served by forcing the reporter to reveal the source's identity. *See Tribune Co. v. Huffstetler*, 489 So. 2d 722, 723-24 (Fla. 1986); *Morgan v. State*, 337 So. 2d 951, 955-56 (Fla. 1976).[10] There was no dispute that Petitioner possessed relevant information, and this point was not litigated. Additionally, based on the sworn affidavit of a state investigator, *see* 101a, as well as that investigator's sworn testimony at the hearing on Petitioner's Motion, *see* R19-20, the State maintained that it had exhausted all alternative ways of determining who had "leaked" the Termination Order to Petitioner.[11] Based on these sworn statements (later shown to be inaccurate), Petitioner did not challenge the State's representations, and this point also was not litigated. Instead, both Petitioner and the State focused their arguments at the

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[10] More than 70 reporter's privilege cases have been litigated in Florida's courts since *Morgan* was decided in 1976. Until now, no trial or appellate court decision forcing a reporter to reveal a confidential source ever has been upheld—or even denied review—by the Supreme Court of Florida.

[11] It became apparent in 1992 that the State had done no such thing. Until the statute of limitations on the alleged crime committed by Petitioner's source ran in May 1991, the State Attorney's investigation was presumptively "active" and documents pertaining to it therefore were exempt from disclosure pursuant to Florida's Public Records Act. *See* Fla. Stat. Ann. § 119.07 (West 1991). Thus, at the time Petitioner moved to quash the subpoena, and at the time he litigated his appeal in the Fourth District Court of Appeal, he was unaware of the incomplete nature of the State's investigation. When the Report became available to Petitioner and the public, it became clear that the State's investigation had not been thorough and that the investigator's testimony that all "alternative sources" had been pursued was disingenuous at best.

trial and appellate levels on the third prong of Florida's qualified privilege law. *See* R80-85, 104.

In attempting to satisfy its burden on this issue, the State ignored the only interest truly at stake (the orderly administration of justice) and instead characterized the interest to be served by forcing Petitioner to reveal his source as a generalized interest in the protection of the privacy rights of Florida's children. R104;[12] *see, e.g.*, R59; Answer Brief at 23. In so doing, the State mischaracterized an ordinary records-keeping statute, designed to regulate State employees, as a legislative prohibition on publication.[13] *See, e.g.*, R59 (at the hearing on Petitioner's Motion to Quash, the prosecutor argued that, despite the fact that Petitioner had learned the contents of the Termination Order, he nevertheless should have challenged "the sealing of the order" before publishing it, "and . . .

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[12] Unable to rely on Florida's reporter's testimonial privilege law, which provides that such "generalized" interests are insufficient to overcome a reporter's right to shield the identity of a confidential source, the State relied instead on an inapposite access case and an aberrational contempt case concerning a reporter's deliberate violation of a specific court order directed solely at her. *See In re Adoption of H.Y.T.*, 458 So. 2d 1127, 1128-29 (Fla. 1984); *Mayer v. State*, 523 So. 2d 1171, 1176 (Fla. Dist. Ct. App. 1988).

[13] The Florida legislature intended no such construction. Indeed, Petitioner never has challenged the constitutionality of Fla. Stat. Ann. § 39.411, because it plainly does not prohibit newspapers from publishing the contents of records relating to termination proceedings. Instead, like more than 300 other Florida statutes, it simply exempts a particular category of official records from public disclosure. *See, e.g.*, Fla. Stat. Ann. § 370.07(6)(a) (West 1992) (exempting reports from wholesale dealers of salt-water products showing "the names and addresses of persons from whom or to whom saltwater products are purchased or sold, the quantity so purchased or sold from or to each vendor or purchaser, and the date of each such transaction"). *Compare* Fla. Stat. Ann. § 794.03 (West 1992) (punishing as a misdemeanor the printing, publication, or broadcasting of any "fact or information" tending to identify a victim of a sexual offense in any "instrument of mass communication").

failed to do so. If there was so wide interest of publicity [sic] in this order and in this case then that interest would have remained when the appellate court reached their [sic] decision. It would have remained six months from now, six weeks from now . . .''). Likewise, in support of its argument that "the State's interest in protecting participants[,] particularly children in these proceedings from publicity, is paramount to the media's first amendment right to access to court proceedings," Answer Brief at 27-28, the State relied on the appellate court ruling in *The Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986), *review denied*, 509 So. 2d 1117 (Fla. 1987), *rev'd*, 491 U.S. 514 (1989), which it insisted was reversed by this Court on "other grounds." Answer Brief at 28.

Petitioner repeatedly attempted to clarify this "confusion worse confounded,"[14] arguing, for example, that while what the State characterized as his "publication of improper matters" could be censured by civil actions for libel or invasion of privacy, the publication could not, "consistent with the First Amendment," be censored. *See* Appellant's Reply Brief at 4 n.1.

The State's legal arguments—and the factual inaccuracies and misrepresentations on which they were based—apparently confused the court below, which concluded that Petitioner's jail sentence was appropriate because he lacked a "privilege" to include quotations from the Termination Order in his news story.

~~Though~~ the State may argue that it did not intend the result it has so relentlessly pursued, its briefs, its oral arguments, and the public statements made by its representatives all demonstrate, forcefully, that it believes that

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[14] J. Milton, *Paradise Lost*, book ii, l.995 (1667).

punishing Petitioner for his reporting is perfectly proper.[15] Thus, having repeatedly argued that Petitioner should be punished for publishing the contents of a judicial order, and having secured trial and appellate rulings permitting such punishment, the State cannot now retreat from the federal law question *it* created. "It is irrelevant to this Court's jurisdiction whether a party raised below and argued [the] federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media*

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[15] The federal question before this Court does not actually implicate Florida's qualified testimonial privilege for reporters. The evidence relating to the second part of the three-part test for the reporter's privilege is rife with factual misrepresentations and inadequacies, and the State's argument relating to the third part of the test was so misfocused that it produced a record devoid of any analysis of the correct state interest at stake. The record, therefore, is wholly unsuitable to a review of the constitutional issues surrounding the reporter's privilege, an area of law now richly developed by statutory, constitutional, and common law in 38 states and by federal common law in 11 circuit courts. *See generally United States v. Lopez*, 1987 U.S. Dist. Lexis 11115 (E.D. Ill. 1987) (surveying authority); *Newton v. National Broadcasting Co.*, 109 F.R.D. 522, 526-29 (D. Nev. 1985) (same); Note, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1600 (1985).

Moreover, since this case did *not* arise from the investigation of a high crime, it bears little resemblance to traditional reporter's privilege cases. Since at least 1972, no Florida or federal court has upheld an order forcing a reporter to disclose a source, except in cases involving high crimes such as murder, kidnapping, and assassination threats against the President of the United States. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987); *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975). In cases involving lesser crimes, such as government leaks, courts have declined to force disclosure, particularly where, as here, the government could have discovered the information it purported to want and simply refused to do so. *See, e.g., In re Grand Jury Proceedings*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd*, 963 F.2d 567 (3d Cir. 1992) (*en banc*). In electing to pursue Petitioner, the State merely used its subpoena power as a pretext to punish Petitioner for learning about and quoting from the Termination Order.

Co., 111 S. Ct. 2513, 2517 (1991) (citations omitted); *see generally Norris v. Alabama*, 294 U.S. 587, 590 (1935).

REASON FOR GRANTING THE WRIT

The First And Fourteenth Amendments To The United States Constitution Forbid The State Of Florida From Punishing A Journalist For Reporting The Contents Of A Widely Disseminated Court Order.

The narrow question presented for review is whether a government, unwilling to police the derelictions of its employees, may elect instead to prosecute a news reporter for tacitly bringing this official carelessness to the attention of the community.

This question is both simple and hardly new. History shows that government officials repeatedly have attempted to censure—through civil and criminal penalties—the publication of truthful information illustrative of official error.[16]

Nor does the answer to the question require fresh furrows in the First Amendment landscape. For, in an unbroken line of cases resting on principles as old as the

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[16] An early controversy involved James Franklin—publisher of the *New England Courant* and older brother of Benjamin—in 1722. *See* S.J. Ervin, *In Pursuit of a Press Privilege*, 11 Harv. J. on Legis. 233, 234 (1974). There, the Massachusetts Assembly had taken umbrage with a series of "several stinging pieces" that had "allegedly libeled the government." *Id.* (citing B. Franklin, *Autobiography* 10 (H. Weld. ed. 1848)). Franklin refused to identify the author of the stories, and was jailed for a month. *Id.* Upon his release, he was forbidden to ever publish the *Courant* again. *See* N.Y.L. Revision Comm'n., *Report, Recommendations and Studies* 70 (1949). As Thomas Jefferson would observe roughly a century later: the press is "first shut up by those who fear the investigation of their actions." Thomas Jefferson to John Tyler, June 28, 1804, *reprinted in Thomas Jefferson: Writings* 1146, 1147 (1984).

Republic, this Court has held that the truthful publication of lawfully obtained official information may not be punished absent proof that the sanction imposed is "narrowly tailored to [serve] a state interest of the highest order. . . ." *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *see also Daily Mail*, 443 U.S. at 101-02; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). No such interest is at stake here.

A. This Court's Recent Decision In *Florida Star* Commands Reversal Of The Decision Below.

Three years ago, this Court held that the publication of a rape victim's name could not subject a Florida newspaper to damages in a privacy suit decided on a theory of negligence *per se*. *See Florida Star*, 491 U.S. at 541. That "limited" holding was based on the settled constitutional rule that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order," and this Court's determination that "no such interest [was] satisfactorily served . . . under . . . the facts of this case." *Id.*

A similarly narrow holding is warranted here, and summary reversal is appropriate. *See Easton Publishing Co. v. Boettger*, 493 U.S. 885 (1989); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977).

In *Florida Star*, the plaintiff, a private figure who had been robbed and raped at knifepoint by an attacker then still at large, was identified in a news story in violation not only of a Florida criminal statute, but also of the newspaper's own internal policies. Angry and frightened, she brought suit against the newspaper and the Sheriff's Department whose employees had erroneously, if inadvertently, made her identity available to the public and press. A Florida jury awarded her $100,000 in compensatory and punitive damages, and the newspaper appealed.

This Court, resolving the matter within "the discrete factual context" in which it arose, reversed, holding that " '[I]f a newspaper lawfully obtains truthful information about a matter of public significance[,] then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'" *Florida Star*, 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103). No such interest had been asserted there, this Court held, because (1) government carelessness had permitted a newspaper reporter to acquire the court record lawfully; (2) the "extreme step" of imposing liability on a newspaper for its truthful publication of an event of community interest was neither warranted by the facts of the case nor "narrowly tailored" to serve a compelling interest; and (3) when "a state attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly," which it cannot do by punishing "media giants" for disseminating the information, while declining to punish public employees or private individuals for the same wrong. *See Florida Star*, 491 U.S. at 534-40.

Integration of this "delicate calculus" here, *see Daily Mail*, 443 U.S. at 106 (Rehnquist, J., concurring in the judgment), commands reversal of the decision below. To draw the contrast with the three factors discussed in *Florida Star*, first, the governmental indiscretions preceding Petitioner's lawful acquisition of the Termination Order were far more egregious than the "inadvertence" of the Sheriff's Department in *Florida Star*. Second, the interest of the court in policing its employees, while important, is not as powerful as the privacy interests asserted in *Florida Star*. Third, the statute at issue here, while mandating the punishment of government employees, has been used by the State solely to punish a news reporter.

Thus, legally this case is indistinguishable from *Florida Star*, while factually it presents more compelling grounds for reversal. The official record at issue was not a police report whose publication jeopardized the safety of a previously anonymous rape victim, but an unremarkable court order summarizing information already in the public domain about a notorious child abuser. The news reporter's decision to quote 54 words of the official record did not violate either a Florida criminal law or his newspaper's internal policy, but, rather, brought authoritativeness to his news report, as well as the incidental suggestion that courthouse employees were not keeping secrets very well. And, finally, the litigation was not a civil suit instituted by an angry crime victim seeking redress from a newspaper and the government, but a contempt prosecution instituted against a reporter who exposed the carelessness of government employees. Indeed, the most striking similarity between the facts of this case and those at issue in *Florida Star* is that, in both, the prohibitions imposed by the State have "every appearance" of being prohibitions the government was "prepared to impose upon the press but not upon itself." 491 U.S. at 542 (Scalia, J., concurring in part and concurring in the judgment).

1. The Statute at Issue Places an Affirmative Duty on Government Employees to Shield Confidential Documents and Cannot Be Used as a Governmental Sword to Punish a Reporter when those Employees Disregard their Duties.

Where sensitive information rests in the government's hands, it is the responsibility of the government to protect its confidentiality. *See Florida Star*, 491 U.S. at 534. In Florida, where records concerning the termination of parental rights are to be kept secret, the obligation to protect their confidentiality belongs to the court and court employees. *See* Op. Fla. Att'y Gen. No. 91-32 (May 14, 1991). Courts have at their disposal a number of "internal procedures" that can be used for this purpose. *See Landmark*

Communications, 435 U.S. at 845. None was employed below.

Judge Kanarek, for example, had the authority to issue an order specially sealing the Termination Order, but chose not to do so. *See* R7-8. Similarly, the Juvenile Clerk had the duty to keep records like the Termination Order "separate from other [court] records" to maintain their confidentiality. *See* Fla. Stat. Ann. § 39.411(3). She chose not to do so. Instead, she made at least one unauthorized copy of the Termination Order, which she gave to a courthouse friend, and permitted at least one other courthouse friend to review the filed copy. *See* 67a-68a.

More copies of the Termination Order were subsequently made and read at the West Palm Beach office of HRS, which had received its copy via telecopier from the Stuart office of HRS, where it also had been read by "a number of HRS employees." *See* 86a. As the Report shows, no one at the court took any special steps to caution anyone at HRS to keep the information in the Termination Order confidential.

Nor were the attorneys representing the parties given any special instructions. Patricia Santiago, who represented HRS, brought another HRS employee with her to pick up the Termination Order, and, upon returning to her Stuart office, permitted at least four other persons to read it before telecopying it to the West Palm Beach office. *Id.* Counsel commented on the Judge's ruling in interviews with *The Palm Beach Post* and Petitioner. *See* 49a-52a.

No one knows whether any of the individuals known to have seen the Termination Order discussed its contents with family members or friends on May 29, because no one ever asked. Yet, in a small, closely-knit community like Stuart (population 12,000), where interest in the outcome of the Puffinberger case was enormous, it is not "[un]reasonable to assume" that information about the

Termination Order had traveled "swiftly by word of mouth" long before *The Stuart News* was delivered on the morning of May 30. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 567 (1976).

Information is either confidential or it is not: "Three may keep a Secret, if two of them are dead." B. Franklin, *Poor Richard's Almanack* (1735).[17] Once supposedly confidential information has been communicated to persons lacking authority to know it, the *raison d'etre* for confidentiality and the state interest it serves cease to exist. *See Florida Star*, 491 U.S. at 540 (refusing to predicate damages on the "mass scope" of a dissemination, where neighborhood gossip could have had "consequences" equally "devastating"). "[W]here the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." *Id.* at 535.

Unlike government employees, Petitioner did not break the law by reporting portions of the Termination Order. Nothing in Fla. Stat. Ann. § 39.411 prohibited him from doing so; and, Judge Ferris's mistaken belief to the contrary, no court ever said he could not. *Compare* Fla. Stat. Ann. § 24.108(7)(b) (West 1991) (requiring "any person" in possession of information regarding security measures used in state lottery to "maintain its confidentiality"); *Mayer*, 523 So. 2d at 1176 (specific court order prohibiting publication violated by news reporter).

Moreover, Petitioner broke no law by receiving information about the Termination Order. *See Florida Star*, 491 U.S. at 536 ("Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida

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[17] *See Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1379 (Fla. 1989) (child abuse report made confidential by statute became "legitimately within public domain" when prosecutor's secretary gave it to reporter); *see also Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980).

has not taken this step") (emphasis in original). Indeed, no portion of Fla. Stat. Ann. § 39.411 prohibits receipt of copies of court records; the statute merely prohibits government employees from releasing them.

2. The Interests at Stake in *Florida Star* Were Far More Compelling than the Interest at Stake Below.

Florida's statutory and common law manifests even less concern for the privacy interest asserted here than for the interest asserted in *Florida Star*. The statute at issue here restricts disclosures of confidential information made by "judge[s], employee[s] of the court, authorized agent[s] of [HRS], or law enforcement agent[s,]" yet permits "a child and the parents or legal custodians of the child and their attorneys" to inspect and copy records—without restrictions of any sort. *See* Fla. Stat. Ann. § 39.411(3)-(4). In and of itself, this facial underinclusiveness would raise "serious doubts" as to whether the statute protects the "privacy rights" of children at all. *See Florida Star*, 491 U.S. at 540.[18]

Nor is the privacy interest asserted here protected by Florida's common law. For, though the State recognizes a cause of action for invasion of privacy based on the publication of private facts, it also specifically bars recovery where those supposedly "private facts"—even when contained in records made confidential by statute—are newsworthy. *See Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1378-79 (Fla. 1989) (newsworthiness bars recovery for publication of child abuse records made confidential by state statute), *rev'g* 514 So. 2d 1136 (Fla. Dist. Ct. App. 1987), *cited in Florida Star*, 491 U.S. at 550 n.3 (White, J., joined by Rehnquist, C.J., O'Connor, J., dissenting).

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[18] *Compare* Fla. Stat. Ann. § 415.502(14)(c) (West 1992) (punishing as a misdemeanor the disclosure by "any person" of "any confidential information" contained in certain child abuse records).

Thus, the only interest at stake here is the orderly administration of justice—an interest that, while meaningful, is far less weighty than numerous interests (including those asserted by the plaintiff in *Florida Star*) that have been explicitly rejected by this Court as being insufficiently compelling to justify incursions on First Amendment rights.[19]

Finally, there is no proof anywhere in the record that any purported harm—real or imagined—actually occurred as a result of Petitioner's quotation of 54 words from the Termination Order. No lives were lost, no one's personal safety was threatened, no privacy interest was imperiled. Indeed, far from having a detrimental impact on the "orderly administration of justice," Petitioner's news story may have served a beneficial purpose. Six weeks after Petitioner's news story on the Termination Order, Judge Kanarek issued his final ruling in the Puffinberger matter, placing Charlotte May up for adoption. As *The Stuart News* then noted, this order was "delivered [to the court] in a sealed envelope marked 'confidential.'" *See* T. Roche, "Judge's custody ruling secret," *The Stuart News*, July 14, 1990, at A1.[20]

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[19] *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 510 (1991) (interest in depriving criminals of the profits of their crimes); *Texas v. Johnson*, 491 U.S. 397, 417-20 (1989) (interest in preservation of flag); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-10 (1982) (interest in well-being of minor rape victim).

[20] On June 1, 1990, two days after Petitioner's news article was published, Florida's open records law was amended to provide, in cases of child abuse, a "*presumption* that the best interests of a child and child's siblings . . . [would] be served by full public disclosure of the circumstances of the death of the child and any other investigation concerning the child and child's siblings." *See* 10a-11a. Thus, at the same time that the State was prosecuting Petitioner for supposedly violating the privacy rights of a child caught up in an abuse case, the Florida Legislature was enacting legislation designed to focus additional public scrutiny on child abuse cases.

3. No State Interest "Of the Highest Order" May Be Credibly Asserted Where Threats to that Interest Go Unpunished and Ignored.

Where, as here, "the government retains ample means of safeguarding significant interests upon which publication may impinge," yet permits its own employees to ignore them; and where, as here, a newspaper reporter has been arbitrarily singled out for punishment for disseminating information that has become public through that governmental indiscretion; and where, as here, the purpose of the reporter's dissemination was "to reproduce, with no substantial change, the government's rendition of the event in question," the First and Fourteenth Amendments prohibit a state from punishing the reporter for the publication. *See Florida Star*, 491 U.S. at 536; *id.* at 541-42 (Scalia, J., concurring in part and concurring in the judgment) ("a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citation omitted); *Daily Mail*, 443 U.S. at 110 (Rehnquist, J., concurring in the judgment) (finding it "difficult to take very seriously" a state's "asserted need to preserve the anonymity of its youthful offenders" when the statute at issue prohibits newspapers from printing their names, but "permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment").

Indeed, it is difficult to "take very seriously" Florida's asserted interest in protecting the privacy rights of a child, when the State failed even to inquire of its own employees where and to whom (other than Petitioner) they might have passed on information about the Termination Order—and took no action against any of them. Yet, where "a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by ap-

plying its prohibition evenhandedly . . . ." *Florida Star*, 491 U.S. at 540. The State did not do so here.

B. Fundamental Constitutional Interests Are Seriously Threatened When A State Prosecutes A Reporter For His Truthful Publication Of A Widely Disseminated, Unsealed Order.

As the Supreme Court of Florida has recognized: "[t]he First Amendment is clearly implicated when government moves against a member of the press because of what [he] has caused to be published." *Morgan*, 337 So. 2d at 956.[21] Petitioner's quotation of 54 words, though conveying no new facts about a celebrated child abuse case, contributed a useful piece of information to the public's understanding of the operation of government.

> [F]reedom of the press is ultimately founded on the value of enhancing [public] discourse for the sake of a citizenry better informed and thus more prudently self-governed. '[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government

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[21] Here, "[t]he authorities would presumably never have learned of the breach of confidentiality" regarding the Termination Order "if they had not read [its] contents . . . in the newspaper." *Morgan*, 337 So. 2d at 956. *Compare* R9 (testimony of Judge Kanarek, in which he stated that he had learned that his "order had become known to the public" when he saw Petitioner's article in *The Stuart News*). Thus, had Petitioner viewed the Order, but decided against quoting it in his news story, the crime the State purports to prosecute still would have occurred, but may not have been prosecuted. This suggests that the State has impermissibly "exact[ed] a penalty on the basis of the content of a newspaper." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *cf. Simon & Schuster*, 112 S. Ct. at 514 (Kennedy, J., concurring in the judgment) ("When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment . . .").

> from limiting the stock of information from which members of the public may draw.'

Cohen, 111 S. Ct. at 2523 (Souter, J., dissenting) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)).

"With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting*, 420 U.S. at 492; *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-71 (1980); *Nebraska Press Ass'n*, 427 U.S. at 586-87 (Brennan, J., concurring). That beneficial function cannot be performed where, as here, the publication of truthful reports about judicial proceedings carries with it the probability of official harassment and the possibility of jail. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions"). The danger of the decision below rests in the virtual certainty that some reporters in Florida will separate what they know from what they publish. And where truth is restricted, mystery and distortion take its place. *See* T. Paine, *The Age of Reason* (1795).

Respectfully submitted,

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APPENDIX

Supreme Court of Florida

TUESDAY, JUNE 2, 1992

CASE NO. 79,295

IN RE: INVESTIGATION: FLORIDA STATUTE 27,04, SUBPOENA OF TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DISTRICT COURT OF APPEAL, 4TH DISTRICT NO. 90-3071

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BARKETT, GRIMES, KOGAN and HARDING, JJ., concur
SHAW, C.J., OVERTON and MCDONALD, JJ., dissent

Hon. Marilyn N. Beauttenmuller, Clerk
Hon. Marshal Stiller, Clerk
Hon. John G. Ferris, Judge

BH

cc: Robert L. Lord, Jr., Esquire
Bruce W. Sanford, Esquire
Anne R. Noble, Esquire
L. Martin Reeder, Jr., Esquire
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Bruce Colton, Esquire
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A True Copy
TEST:

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

District Court of Appeal of Florida,
Fourth District.

No. 90-3071.

In re INVESTIGATION: FLORIDA STATUTE 27.04, SUBPOENA OF Tim ROCHE,

Appellant,

v.

STATE of Florida,

Appellee.

Nov. 13, 1991.
Certification Denied Dec. 27, 1991.

DOWNEY, Judge.

This case involves a consideration of the tension between the constitutional right of the public to unencumbered access to information from anonymous sources and the generalized governmental interests in protecting the secrecy of juvenile proceedings from public scrutiny. More particularly, the case focuses upon a determination of the priority of societal interests in requiring certain proceedings to remain confidential as opposed to a reporter's privilege against coerced disclosure of confidential sources.

The controversy underlying this appeal began in November, 1988, when three-year-old Crystal Lynn McGrath was tortured and beaten to death at the home of her mother, Cheryl Puffinberger, and her stepfather Carl Puffinberger. In January, 1989, amidst widespread publicity, Cheryl and Carl Puffinberger were both arrested on ag-

gravated child abuse charges. Later that year Carl Puffinberger was sentenced to ten years' imprisonment for aggravated child abuse, while Cheryl Puffinberger pleaded no contest to neglect charges based on her failure to report the violence leading to Crystal's death and received a nine-month jail term. In November, 1988, after Crystal's death, her half-sister, Charlotte May Puffinberger, an infant, became a ward of the state and HRS sought to terminate the parents' parental rights. Carl Puffinberger relinquished his parental rights. In May, 1990, after a termination hearing, Judge Kanarek found Cheryl Puffinberger to be unstable and unfit and entered an order terminating her parental rights. This order was officially closed to public inspection pursuant to statute. A news story about this decision appeared the following day, May 30, 1990, in The Stuart News written by appellant Tim Roche.

On August 30, 1990, a subpoena was issued requiring Roche to give testimony in an action styled: In Re Investigation: Florida Statute 27.04, wherein the state attorney sought to investigate the apparent statutory violation in the public disclosure of the contents of the court's order in said proceeding. Roche filed a motion to quash the subpoena and for a protective order. Pursuant to a motion by the state, the trial court issued an order directing Roche to show cause why he should not be held in contempt for failing to answer questions regarding the state's investigation as to the source and identity of the person who provided Roche with the confidential order issued by Judge Kanarek. Following an evidentiary hearing on the matter, the trial court entered an order requiring Roche to reveal the identity of the person who provided him with a copy of Judge Kanarek's confidential order within ten days. The order further provided that, if Roche failed to comply, he was adjudicated guilty of indirect criminal contempt and sentenced to thirty days in the Martin County Jail, provided however that he could purge himself of the contempt at any time by complying with the court's order. On Oc-

tober 31, 1990, the state filed its affidavit of noncompliance with the court's order and Roche was adjudicated guilty of indirect criminal contempt. Roche then filed a notice of appeal from the trial court's order.

The parties agree that sections 39.411 and 39.467, Florida Statutes (1989), require that proceedings terminating parental rights are protected and not subject to public scrutiny. Furthermore, they acknowledge that under the auspices of the first amendment to both federal and state constitutions a reporter has a qualified privilege not to disclose his sources of information. *CBS, Inc. v. Cobb*, 536 So.2d 1067 (Fla. 2d DCA 1988). As the rule itself provides, the privilege is not absolute and may of necessity, in certain situations, give way to a greater right such as the societal interest served by the mandate that certain proceedings remain private and confidential. When presented with a conflict between these competing interests, the trial court must strike a proper balance between the reporter's constitutional right to the anonymity of his sources and society's interest to be protected by compelling disclosure. The criteria for determining the necessity of disclosure as set forth in *Cobb* are:

> (1) whether the information sought is relevant to issues in the case; (2) whether any alternative source exists for the information; (3) whether there is a compelling interest in the information. Only if all three questions can be answered in the affirmative may a journalist be required to relinquish or disclose privileged matters.

Id. at 1070.

The Supreme Court of Florida analyzed the balancing test and its proper application in *Miami Herald Publishing Co. v. Morejon*, 561 So.2d 577 (Fla.1990), while discussing the seminal case of *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972):

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 579. The application of the rule was further explicated by the *Morejon* court in analyzing two Florida decisions, *Morgan*[1] and *Huffstetler*[2] as follows:

> Since *Branzburg* this Court has twice had occasion to consider the existence and scope of the reporter's privilege in Florida. In *Morgan v. State*, 337 So.2d 951 (Fla.1976), this Court overturned a contempt citation issued against a reporter for failing to reveal the identity of the source of information for her article, published in the *Pasco Times*, containing a synopsis of a sealed grand jury presentment. In deciding whether Morgan was privileged to refuse to reveal her source, this Court adopted the approach taken by Justice Powell in his concurring opinion in *Branzburg*, i.e., the application of the reporter's privilege in a given case involves striking a proper balance between constitutional and societal interests. We found that the public interest in unencumbered access to information from anonymous sources outweighed the generalized governmental interest in the secrecy of grand jury proceedings sought to be advanced in compelling disclosure of the confidential informant's identity. Thus, in *Morgan* we recognized for the first time a limited or qualified reporter's privilege against the forced revelation of confidential sources.

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[1] *Morgan v. State*, 337 So.2d 951 (Fla.1976).

[2] *Tribune Co. v. Huffstetler*, 489 So.2d 722 (Fla.1986).

> This Court further addressed the qualified reporter's privilege recognized by *Morgan* in *Tribune Co. v. Huffstetler*, 489 So.2d 722 (Fla.1986), which arose out of a challenge to a contempt citation issued against a *Tampa Tribune* reporter. The reporter coauthored a *Tribune* article announcing that an influential resident had filed a complaint with the ethics commission charging two county commissioners with misuse of office. When the reporter refused to reveal the identity of his confidential source, the circuit court found him guilty of contempt. This Court overturned the contempt citation. Following the case-by-case balancing analysis utilized in *Morgan*, we held that the limited and qualified privilege that a reporter has to protect his sources of information outweighed the public interests in prosecution of a violation of a statute which basically amounts to a private interest in reputation.

Id. at 579-580.

In passing, we note that the state relies to some extent on the *Morejon* case. However, other than setting forth the guidelines relevant to determining the balancing test applicable to a reporter's qualified privilege not to disclose his confidential sources, we find little factual similarity to this case. In *Morejon* the reporter divulged what he personally observed and not what was told to him by some private source. Thus, as the supreme court said therein:

> We adhere to the district court's conclusion that there is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eye-witness observations of a relevant event in a subsequent court proceeding. The fact that the reporter in this case witnessed the event while on a news-gathering mission does not alter our decision. Holding that the limited and qualified privilege set forth by this Court in *Morgan* and *Huffstetler* has absolutely

> no application in this case makes it unnecessary to balance the respective interests involved.

Id. at 580 (footnote omitted).

The parties agree further that requirements one and two of the balancing test were met in the trial court presentation; issue was joined there and here in regard to requirement three. Roche contends that, under the facts of this case, there is no compelling interest in requiring him to divulge his sources because the privacy interests of this child have long since been blown, so to speak, by the earlier pervasive publicity surrounding the case and its background. Furthermore, Roche relies upon the cases of *Morgan v. State*, 337 So.2d 951 (Fla.1976), and *Tribune Co. v. Huffstetler*, 489 So.2d 722 (Fla.1986), wherein the Florida Supreme Court held that a generalized interest in the secrecy of government operations should not ordinarily take precedence over the interest involved in assuring the public access to information that comes to the press from confidential sources. Those cases, as pointed out earlier, declined to give priority to the law sealing grand jury indictments or the law providing confidentiality in dealing with ethical violations of public officials.

Appellee responds initially by calling attention to the fact that in both *Morgan* and *Huffstetler* the real interest sought to be protected was private and not of sufficient moment to outweigh the importance of the first amendment right under consideration. However, the same cannot be said of the interest in protecting the rights of children which has always been of primary importance and given preferential treatment by the courts of this land. For example, in *In re: Adoption of H.Y.T.*, 458 So.2d 1127 (Fla.1984), the court upheld the constitutionality of section 63.162(1), Florida Statutes (1983), against a challenge by the press that the statute making adoption proceedings confidential did not outweigh the media's first amendment right of access to court proceedings. The court then rec-

ognized the "overriding public policy of protecting from harmful publicity parties to and the subject of adoption proceedings," the thrust of which proceeding is to serve the best interests of the child involved. It is noteworthy that in *H.Y.T.* the court expressly rejected the media argument that there had already been widespread publicity in the case affecting the child's right of privacy. That argument, said the court, "attempts to lay on the shoulders of the child the burden of proving a need for the protection the people of the state, through the legislature, have attempted to afford the parties to an adoption." *Id.* at 1129. Later, in *Mayer v. State*, 523 So.2d 1171 (Fla. 2d DCA 1988), the Second District Court of Appeal followed the ruling in *H.Y.T.* and concluded that, on the facts of that case, the privacy rights of minors as protected by the statutes involved therein took precedence over the media's first amendment rights involved.

We conclude, as did the trial judge, that the purposes served by maintaining the confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's disclosure of the court order involved herein and that such action on his part was not qualifiedly privileged.

The order appealed from is therefore affirmed.

GUNTHER and FARMER, JJ., concur.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA

Felony Division

Case No.

IN RE: INVESTIGATION:
FLORIDA STATUTE
SUBPOENA OF
TIM ROCHE

ORDER

This matter is before the Court on Tim Roche's Motion to Quash Subpoena and Motion for Protective Order, and on State's Order to Show Cause.

The Court has heard the testimony of witnesses for the State and the argument of counsel and has had the benefit of helpful memoranda of law from both parties. The Court finds as follows:

1. Circuit Judge Paul Kanarek, of this Circuit, issued an order terminating parental rights in the "Puffinberger" case on May 29, 1990. This case was one which had previously attracted high media and public attention in its criminal actions.

2. Under Florida Statutes 39.411 and 39.467, such orders, and the proceedings leading to their issuance are designated confidential and available only to certain designated officials. Each statute has a provision allowing a Court to authorize disclosure when it deems proper and to punish by contempt any violations. Tim Roche was not an authorized or designated person to have possession of said orders.

3. Section 119.07 of Florida Statutes was amended by the Legislature's adoption of Sec. 119.07 (7)(b)(2)

effective June 1, 1990, which provides a *presumption* that the best interests of a child and child's siblings (our case here) will be served by full public disclosure of the circumstances of the death of the child and any other investigation concerning the child and child's siblings.

4. That there was no application to Judge Kanarek to release the report to Tim Roche or anyone on his behalf but that Roche nevertheless obtained a copy of the order and printed substantial portions of it in his paper the next day.

5. Roche admits refusing to answer after being subpoeaned by the State Attorney and disclosing the source of his obtaining of said order.

6. That investigators from the State Attorney have interviewed, under oath, over 22 persons who could possibly have been in lawful possession of said order and could not determine the source of the turnover of said order to Roche.

7. That it is important to the integrity of the Court system generally and to the process and judgments of the Court in particular that orders of the Court be obeyed by those charged with the responsibility of processing and safe-keeping the records and documents entrusted to their care and in accordance with the tenor and directive of the Statute and particular order involved.

8. Issue here is therefore joined on the provisions of the juvenile statutes along with Judge Kanarek's order as against the claim of Roche of the protection of the First Amendment. Stated somewhat differently, can Roche unilaterally but deliberately violate an order of a Court of competent jurisdiction under the guise of the privilege and protection of the First Amendment?

9. The answer lies in the balancing test articulated in Branzburg vs. Hayes, 408 U.S. 665, 925 Ct. 264 (1972) which provides:

> "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

10. The societal interests in this case are, the obligation of all citizens to give relevant testimony with respect to criminal conduct, the investigation of a possible criminal violation of the Juvenile Justice laws, the violation of the umbrella of protection of the minor child who was the subject of an order of the Circuit Court having jurisdiction over the Subject matter of its order. The Constitutional interest in this case is the qualified privilege and the protection granted the press by the First Amendment as augmented by the presumption in Sec. 119.07(7)(a). This presumption was not in effect when Rouche published the order in question and in any event is a presumption which is not conclusive but is rebuttable and certainly envisions some sort of hearing. See Fla. Statutes Section 90.301. It is interesting to note that Judge Kanarek took 3 days of testimony before entering his findings and order.

In applying the *Branzburg* balancing test, the Florida Supreme Court has in *Tribune Co. vs. Huffsteler*, 489 So.2d 722 (Fla. 1986) and in *Morgan vs. State* 377 So.2d 951 (Fla. 1976) found that the constitutional interests outweighed societal interests, which amounted to protection of *private* interests, as reputation of the individual.

In this case the societal interests are enorously important to *all* citizens since the statutes involved are designed for the protection of juveniles from influences deemed harmful to their progress. Further , all citizens are concerned that orders from their Courts of competent jurisdiction will be faithfully, fully, and promptly obeyed until they are overturned by the proper higher authority. Any other course of conduct would be intolerable.

The proper statutory and constitutional officer, the circuit judge sitting in juvenile court, after conducting an extensive hearing, made certain findings concerning a minor under his protection, made to protect the best interests of the child in a very delicate situation. He made certain findings and a disposition and rendered his order confidential.

At this point, if the respondent, Roche, felt aggrieved at the procedure, believed the statute and the Kanarek order unconstitutionally violated the qualified privilege of the press under the First Amendment and that he should not be barred from possession and knowledge of the contents of any order issued, he could immediately address his grievance to Judge Kanarek and if he received an unfavorable result, the Fourth District Court of Appeal is not distant either geographically or procedurally to address his grievance. Roche has shown no great urgency or need to have published the prohibited story the next day and none appears.

A balancing between the constitutinal interests and societal interests as mandated by *Branzburg* indicates that the statutes in question and the Court order involved did not involve private interests or reputation but the protection of an important segment of our society and that integrity for the orders of the courts of competent jurisdiction is absolutely essential and

that these interests far outweighed the constitutional interest of Tim Roche in his publication of said order, well knowing that its contents prohibited it and made a unilateral decision, without submitting to balance tests, to publish.

Accordingly, it is

ORDERED AND ADJUDGED that Tim Roche's Motion to Quash Subpoena be and the same is hereby denied. It is further

ORDERED AND ADJUDGED that Tim Roche's Motion for Protective Order be and the same is, hereby denied. It is further

ORDERED AND ADJUDGED that Tim Roche is ordered to reveal the identity of the person who provided Tim Roche with the order of Judge Kanarek within ten days from the date of this order. If the respondent Tim Roche refuses to reveal the identity of the person after ten days from the date of this order, the Court Adjudges him Guilty of indirect criminal contempt in accordance with the Florida Rules of Criminal Procedure, and it is the judgement of this Court that in that event he serve 30 days in the Martin County Jail. It is further ordered that after the commencment of such confinement, if necessary, respondent Roche may immediately purge himself of said contempt by disclosing, under oath, to the Office of the State Attorney, of the 19th Judicial Circuit, the name and address of the individual from whom Roche obtained the Kanarek order. Said act shall constitute a complete and immediate purge and terminate the contempt and the remainder of any sentence.

DONE AND ORDERED at Fort Lauderdale, Florida, this 20th day of October 1990.

/s/ John G. Ferris
JOHN G. FERRIS.
Circuit Judge (Senior Judge)

Copies to:
Richard A. Barlow
Assistant State Attorney

Robert L. Lord Jr. Esq.

39.411. Oaths, records, and confidential information

* * *

(3) The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, subject to the provisions of s. 63.162, a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the court may deem proper, and may punish by contempt proceedings any violation of those conditions.

(4) All information obtained pursuant to this part in the discharge of official duty by any judge, employee of the court, authorized agent of the department, or law enforcement agent shall be confidential and shall not be disclosed to anyone other than the authorized personnel of the court, the department and its designees, law enforcement agents, and others entitled under this chapter to receive that information, except upon order of the court.

(5) All orders of the court entered pursuant to this chapter shall be in writing and signed by the judge, except that the clerk or deputy clerk may sign a summons or notice to appear.

(6) No court record of proceedings under this chapter shall be admissible in evidence in any other civil or criminal proceeding, except that:

(a) Orders permanently terminating the rights of a parent and committing the child to a licensed child-placing

agency or the department for adoption shall be admissible in evidence in subsequent adoption proceedings relating to the child.

(b) Records of proceedings under this part forming a part of the record on appeal shall be used in the appellate court in the manner hereinafter provided.

(c) Records necessary therefor shall be admissible in evidence in any case in which a person is being tried upon a charge of having committed perjury.

(d) Records of proceedings under this part may be used to prove disqualification pursuant to ss. 110.1127, 393.0655, 394.457, 396.0425, 397.0715, 402.305, 402.313, 409.175, 409.176, and 959.06 and for proof in a chapter 120 proceeding pursuant to ss. 415.103 and 415.504.

39.412. Contempt

The court may punish for contempt any person interfering with the administration of, or violating, any provision of this part or order of the court relative thereto. Any child subject to deprivation of liberty pursuant to this section shall be entitled to representation by legal counsel, as provided in s. 39.071, at all stages of any proceedings under this section.

Department of Health and Rehabilitative Services

Interoffice Memorandum

TO: G. Peter Digre DATE: April 25, 1989
Deputy Secretary for Operations (OP)

FROM: Gerald D. Slavens
Inspector General (OSIG)

SUBJECT: Review of the Death of Crystal McGrath
District 9

Attached is the completed report on the above referenced case. Crystal McGrath (age $3^1/_2$) died on November 23, 1988. According to the medical examiner's report, Crystal died from internal bleeding caused by blunt trauma. The death was classified a homicide. Her parents were arrested and charged with aggravated child abuse. The department has had one prior abuse referral reported on Crystal in June 1988.

Based on the investigation, it was determined that the assigned protective services supervision counselor failed to see the child during home visits after July, 1988. The counselor subsequently resigned from her position with the department. Since the child's death, new evidence has revealed that Crystal was allegedly abused prior to and after the June 1988 referral. Recommendations have been made for the improvement of programmatic issues identified in the report.

If you need additional information, please contact me at 488-1225.

GDS/DC/mam

Attachment

Copy to: M. Powers (OSEA)
R. Williams (9DA)

Department of Health and Rehabilitative Services

Interoffice Memorandum

TO: Gerald D. Slavens DATE: April 24, 1989
Inspector General (OSIG)

FROM: Charles R. Piver
Investigator (D9IG)

SUBJECT: Death Review — Crystal McGrath
Case #11880330

INTRODUCTION

Crystal McGrath (DOB: 1/15/85) died at 8:20 a.m. November 23, 1988, the result of internal bleeding caused by blunt trauma. There were bruises on her face, buttocks, back and groin, ranging from 24 hours old to three days old. The case was ruled a homicide. Both parents were arrested and charged with aggravated child abuse.

BACKGROUND

Department involvement began on June 6, 1988 when the mother, Cheryl Puffinberger, brought Crystal to the Martin County Sheriff's office and reported that her husband, Carl Puffinberger, had been hitting Crystal with his hand and a belt. She gave the impression that this was the only incident of abuse. Crystal and her mother were transported to the Stuart, Florida HRS facility at approximately 1:00 p.m., where they were interviewed by Protective Investigator Barbara Ross and Sheriff's Dectective Vic Green. Ross and Green assessed the risk as "High." The risk assessment was reviewed and signed off by Ross' supervisor on June 8.

According to documentation, Cheryl alleged that Carl drank and smoked marijuana and may have experimented with "Microdots." She further alleged that Carl had recently been in the stockade for a parole violation involving a charge of possession of controlled substances.

On June 6, contact was made with the Child Protection Team, where Crystal was examined by Dr. Scheel at approximately 4:00 p.m. He found that the bruising on Crystal's forehead, hip, buttocks, face and back were consistent with child abuse.

On June 8, a petition for an injunction was filed to keep Carl away from Crystal. The petition read:

"On June 4, 1988, the child's stepfather Carl Puffinberger picked the child up by the hair on top of her head and threw her across the room. The child is frequently disciplined by Mr. Puffinberger using a belt on the child as well as his hand. The child has a large bruise on her buttocks, bruises on her back, left hip, forehead, left cheek and left lower jaw. Child states that her 'Dada' hit her on these areas."

The case was staffed for Early Services Intervention on June 8, 1988 and assigned to CYF counselor Sally Schulte. Schulte provided immediate services starting on this same day. The family was placed under HRS supervision by court order on June 20. Schulte completed her Initial Assessment on August 12 and her Case Plan on August 3. The Initial Assessment included a complete family composition and family relationship description.

Carl and Cheryl were living separately as Carl's parents were upset with Cheryl for reporting him for child abuse. Cheryl and Crystal were living with Carl's paternal aunt. Cheryl was pregnant at the time and near to term.

An arraignment hearing on the dependency petition was held on June 15 where Carl pled to the allegation. The June 6 injunction keeping Carl away from Crystal was

dissolved. Carl and Cheryl reconciled their differences, but remained living apart.

The referral was classified as a confirmed case of Child Abuse and closed out on June 28, 1988.

With Cheryl giving birth to Charlotte on July 1, Crystal moved into Carl's parents' home. With the dissolution of the injunction and the reconciliation, Carl also resided in the home. The state attorney's office declined to prosecute Carl on the one incident of child abuse.

Sally Schulte made approximately twelve family and home visits between June 8 and August 15, 1988. Subsequently, a risk assessment was completed with an overall rating of "Low." Schulte conducted approximately seven more home visits between September 1 and November 15, 1988. During this time, she was arranging for parenting classes, working on family finances and checking on general family conditions. After July 1988, Schulte did not actually see Crystal. On at least two of these visits, she was told that Crystal was either taking a nap or was at a neighbor's home.

On November 22, 1988, paramedics were called to Carl's parents' home because Crystal had stopped breathing. She was revived and transported to Martin County Memorial Hospital where she died the following day at 8:20 a.m.

An FPSS referral was made on November 22, 1988 for the above incident. The response priority was Immediate and the allegation was Severe Abuse/Neglect.

Both parents were interviewed by HRS and sheriff's investigators and denied abusing Crystal. Both stated, in separate interviews, that Crystal had fallen off the couch the previous Friday evening while sleeping at the paternal grandparent's house.

Charlotte was taken into custody at 10:00 a.m. on November 23 and placed in shelter. A medical examination

was conducted where she was found to have bronchitis, an ear infection and a throat infection. Appropriate medical treatment was administered.

The parents were arrested and charged with aggravated child abuse. A March 1989 hearing was held at which Carl pled guilty to the charge. Cheryl pled not guilty and a trial date is pending. Also in March 1989, a dependency hearing was conducted for the sibling daughter, Charlotte. She was adjudicated dependent and placed in foster care. Due to the conviction of Carl and the pending trial of Cheryl, no performance agreement has yet to be issued.

Evidence developed from neighbors after Crystal's death indicated that Carl had been allegedly abusing Crystal since October 1987. This contradicts Cheryl's assertion that Carl abused Crystal only on the June 1988 occasion. Additionally, interviews with neighbors alleged that they had seen bruises on Crystal for some three months prior to her death.

After the death, a case review was conducted by the protective service staff in Stuart, Florida. Schulte stated that she was unaware that she had to actually see the child. Schulte believed that all that was necessary was to meet with the family during her home and family visits. She was the only counselor who held that view.

Schulte resigned before any department disciplinary action could be taken. In her letter of resignation she stated that "if her cases had been properly monitored, her error in judgment might have been caught."

Mr. David Heaton became Schulte's supervisor in August 1988, when Schulte's unit was being dissolved. He met with her on at least a weekly basis to discuss her caseload. He reviewed her daily service logs and did not notice anything out of the ordinary. Schulte never surfaced any problems with the McGrath case.

FINDINGS

The case was first referred to HRS on June 6, 1988, and was immediately investigated by a protective investigator. Both parents were interviewed within the first 24 hours as required. Law enforcement was on the scene, initially, as Cheryl brought Crystal to the sheriff's office. The state attorney was verbally notified the next day. Although written notification is required within the first three days, there was no indication in the case file that this was done.

An assessment of high risk was determined on June 6, within the first 24 hours. As the family appeared to stabilize, a second assessment was completed on August 15 showing low risk. A complete family composition and family relationship survey was accomplished in Schulte's Initial Assessment.

A collateral contact with the Child Protection Team was made within the first 24 hours. Medical examination of Crystal showed that the injuries she received were consistent with child abuse. The case was staffed for Early Services Intervention on June 8 and services were initiated that day by CYF counselor Sally Schulte.

The family was formally placed under HRS supervision on June 20 by court order. Schulte completed her Initial Assessment on August 12 and her Case Plan on August 3. Neither were completed within 30 days as required.

District specific policy requires that in high risk situations, visitations must take place on at least a weekly basis. Schulte's field notes showed that she met this requirement while the risk was considered to be high.

The initial June 6 referral was classified as a confirmed case of child abuse and the case was closed on June 28, 1988. This was within the 30 day requirement.

There appears to have been some instability in the supervisory situation. Schulte's unit was being dissolved and

she received a new supervisor in August 1988. However, the new supervisor Mr. Heaton was Ross' supervisor when the first referral was initiated and a degree of continuity was maintained as he became Schulte's supervisor. There was supervisory review of the initial risk assessment, of the court petitions and an overall case record review prior to closure on June 28.

Schulte's impression that she did not have to see the child in question is contrary to both her training as a protective service counselor and to manual policy.

CONCLUSIONS

Crystal McGrath died a tragic death resulting from physical abuse, allegedly perpetrated by her parents. However, Protective Services Supervision Counselor Schulte did not complete the requirement to see Crystal during home visits. Manual policy states that "for low risk cases, the counselor should have at least one face-to-face contact monthly with each child under supervision." Evidence now indicates that Crystal was allegedly abused for several months prior to and after the June 1988 referral.

Further, information concerning the father's drug history and previous incarceration was not included in the court petitions to keep him away from Crystal. Although it is difficult to conclude what action may have been taken, this information combined with previous incidents of abuse should have been reported.

In her letter of resignation, Schulte claimed her cases were not properly monitored. This may have some validity. Seeing the child is so basic to the job at hand that her supervisor may have assumed it took place. It is however, a supervisory function to assure that policy and procedure are followed. The supervisor should have also noted that the data concerning Carl's drug usage was not included in the petition for the injunction.

RECOMMENDATIONS

Conduct a review of all of Schulte's cases to assure she carried out her visitation functions correctly.

When visiting a household, the counselor must see the child in question as stated in the manual.

Supervisors must ensure that all requirements are adhered to by staff under their supervision.

Per district policy, supervisors must conduct case reviews on a monthly basis. This should be done more frequently if the situation dictates.

Protective investigators and CYF counselors should be encouraged to interview neighbors and family members on all child abuse referrals, even if medical examination substantiates the abuse. These contacts could provide additional information to assist with service planning.

IN THE SUPREME COURT OF FLORIDA

CASE NO.:

LOWER COURT CASE NO. 90-3071

IN RE INVESTIGATION: FLORIDA STATUTE 27.04
SUBPOENA OF TIM ROCHE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT OF JANE DOE,
CHARLOTTE MAY PUFFINBERGER'S FOSTER PARENT

STATE OF FLORIDA
COUNTY OF MARTIN

1. I was the foster parent of Charlotte May Puffinberger and I believe it is imperative that my identity remain undisclosed so as to protect the safety and welfare of Charlotte May. The Department of Health and Rehabilitative Services ("HRS") placed Charlotte May in my custody on December 1, 1989. I have since sought to protect Charlotte May from harm in any way possible.

2. I have been a foster parent for four years. I have had in my custody and care four foster children, and have cared for six other children at the request of HRS. I have adopted three children through the HRS foster care program.

3. In November 1988, after the death of her half-sister Crystal, Charlotte May Puffinberger became a ward of the state. I gained custody of Charlotte May on December 1, 1989.

4. Cheryl Puffinberger, Charlotte May's mother, sought to regain custody of Charlotte May while HRS sought to terminate her parental rights. Because Cheryl Puffinberger was charged with and found guilty of only a misdemeanor child neglect charge, I felt her chances of regaining custody of Charlotte May were quite good. I felt, however, that placing Charlotte May back with Cheryl Puffinberger could result in endangering her. I was deeply concerned about protecting Charlotte May from further neglect, and concerned that what had happened to Crystal could happen to Charlotte May. I was advised by another foster parent that the best way to ensure that this case was handled as a priority by HRS and the court was to keep the case alive in the media, thus generating public concern for the welfare of Charlotte May and ensuring that HRS and the courts would act responsibly.

5. I was in constant contact with HRS, and monitored the case to ensure that Charlotte May's welfare was protected. When I gained custody of Charlotte May, I realized that the local HRS officials had had difficulty in making this case a priority with HRS officials in Tallahassee the entire year that Charlotte May had been in foster care. I realized that nothing was being done by state officials to prepare for the upcoming custody hearing. I also learned that local HRS officials had not been able to obtain funding from the state to conduct psychological evaluations on Cheryl, Charlotte May and others. The delay concerned me because these evaluations (called "psychologicals") are crucial to the custody decision. Soon thereafter, on January 15, 1990, *The Stuart News* published an article entitled "The Bottom Line: A Child's Life." A copy of this article is attached to my affidavit. I believe the article was instrumental in creating public awareness and concern for Charlotte May and in placing pressure on state HRS officials to approve funding for the psychologicals. Approval was forthcoming after *The Stuart News'* article ran.

6. I felt that public awareness was crucial to creating public concern, which would in turn place pressure on HRS and the courts to give this case the priority it warranted. A local church printed a fact sheet which was distributed to approximately 500 local residents. A copy of the fact sheet is attached to my affidavit. The fact sheet explained Charlotte May's predicament and the threat that she might be returned to her mother and subjected to future abuse. It included a news article written by Tim Roche and Betsy Gunderson of *The Stuart News*, and it listed names of legislators and other public officials whom members of the public could write to demand that Charlotte May be protected. I relied on Tim Roche, *The Stuart News* reporter covering this story, and on *The Stuart News*, to keep this case alive, because I was afraid that otherwise Charlotte May's case would slip through the cracks.

7. HRS initially assigned an attorney who had never handled a termination case and who had only recently graduated from law school to handle Charlotte May's custody case. Additionally, the guardian ad litem appointed to protect Charlotte May was not an attorney. Because of pressure from me and the pressure maintained by media coverage of this case, a more experienced attorney was assigned by HRS to handle the termination of parental rights case and an attorney ad litem was appointed to protect Charlotte May's interests.

8. I have also learned that prior to the termination hearing, HRS received more than 50 letters from concerned citizens and that the judge handling the case received as many post cards requesting that Charlotte May be placed in a good home.

9. In my heart, I know that the press, Tim Roche and *The Stuart News* played vital roles in helping insure that Charlotte May did not remain with Cheryl Puffinberger. I did not feel that Cheryl received the help she needed to ensure Charlotte May's safety. I therefore believe that

Charlotte May's life could have ended tragically like Bradley McGee's, the little boy who was killed by his stepfather after being returned to his parents by court order. Bradley didn't have the benefit and protection of public pressure on HRS and the courts generated by press coverage. I made sure that Charlotte May did.

/s/ Jane Doe
JANE DOE, Foster Parent of
Charlotte May Puffinberger

The forgoing instrument was acknowledged before me this 4th day of February 1992 by JANE DOE, Charlotte May Puffinberger's foster parent who is personally known to me or who has produced a Florida Driver License as identification and who did take an oath.

/s/ Judith A. Sonia
Notary Public
State of Florida
Name:
/s/ JUDITH A. SONIA

My commission expires:

THE STUART NEWS

Monday, January 15, 1990 SECTION B

The bottom line: A child's life

Custody case swirls around Puffinberger girl

By Tim Roche of the News staff

STUART—More than a year after her older sister was beaten to death, Charlotte May Puffinberger is waiting for a permanent home.

Her custody case remains unsettled; her future still uncertain.

But the thought of returning the 18-month-old youngster to her abusive parents has begun to frustrate the community around her.

At least one foster family has dropped out of the state's beleaguered child-welfare system. Charlotte May had been the first and the last needy child in the family's care.

A local church group also has launched a letter-writing campaign to discourage state officials from risking the life of another child for the sake of reuniting an abuse-torn family.

Charlotte May has been a ward of the state since she was about 4 months old, since the day in November 1988 when her half-sister, Crystal Lynn McGrath, was killed.

Crystal would have turned 5 today.

Her parents, Carl and Cheryl Puffinberger, were sent to jail last summer after pleading no contest to child abuse charges. The mother has since been released, and has taken steps to show state social workers that she's fit to raise Charlotte May.

Carl Puffinberger's mother and stepfather, Alice and Alvin Hoopaugh, also want custody. They've been talking

to social workers for months, hoping they can raise their granddaughter while Carl serves out his 10-year prison term.

The issue may be resolved in March by Circuit Judge Paul Kanarek.

Meanwhile, state officials have been inundated with letters asking them to monitor the custody case.

The Rev. Gary Durham, senior pastor at the Stuart Church of the Nazarene, said more than half of his 275-member congregation has taken an interest in Charlotte's case by writing legislators and senior administrators of the state Department of Health and Rehabilitative Services.

"If you make a little noise, you might get a little attention," Durham said last week. "We're not trying to become judge and jury. We're just saying that somebody has got to be aware of the dangers involved here. A child's life could be at stake."

George and Gayle Swift, who kept Charlotte May for a year before deciding to leave the foster care program, said the terrified look they remembered in Charlotte's wide blue eyes forced them to get involved.

"The only thing that could be worse than what happened to Crystal is letting Charlotte go back to her parents," Gayle Swift said last week. "We don't want Crystal's death to be in vain. We would hope the hell Crystal went through would be enough. It's not worth taking another risk."

In the month and a half since the Swifts asked HRS to place Charlotte with another family, they've become outspoken foes of Florida's child-welfare system. They've written letters to several lawmakers, including state Sen. William G. "Doc" Myers, R-Hobe Sound.

They received a typed note from Myers last week in which the senator said he would write a letter of his own to HRS.

"Along with the letter goes my insistence that the (custody) decision be based on one of mature judgment and not a straight return to the mother or grandparents," Myers wrote. "We are in the process of making this clear in the statutes during the next (legislative) session."

Despite the promises, an 11-year-old Port St. Lucie boy feels state legislators aren't doing enought to protect abused children. So Sean Salas recently sat down at the kitchen table with a pencil and notebook paper to write President Bush.

"I don't know why the government knows about such things and will let other children be sent back to the very parents that killed that child's brother or sister," the sixth-grader wrote in his letter. "The laws must be changed to protect us kids."

Cheryl Puffinberger's lawyer, Ronald Smith of Stuart, has said Cheryl is trying to change her life. She wants to start over—this time without Carl.

"A lot of people seem to know where the child should live," Smith has said. "But the truth is that she belongs with her mother."

HRS has mapped out a plan for Cheryl to follow before she can be considered for custody. The plan, called a performance agreement, includes suggestions to make her a better parent.

Smith has said Cheryl reported her former husband for abuse five months before Crystal died, but Martin County Sheriff's investigators failed to pursue the case.

As a result of the report, however, HRS assigned a social worker to help rehabilitate the family.

The social worker, Sally Schulte, made some 19 visits to the Puffinberger home in the months after Cheryl reported the abuse. But Schulte never saw Crystal.

In her resignation letter after the youngster's death, Schulte said she was unaware of agency policy requiring face-to-face contact with abused children in her care. She blamed supervisors for not monitoring her caseload.

In March 1989, HRS formalized its process of reviewing cases. Supervisors now make specific inquiries about the status of every case, writing down the responses from social workers to document what's happening.

In light of the public whipping HRS has taken statewide, some members of the agency have said they can understand the recent concern over Charlotte May.

"The community is still up in arms over her sister's death," said HRS spokeswoman Cam Freedlund. "People do what they have to do to protect the children of their community. Everybody's goal is the same here, and that's to protect Charlotte."

FACT SHEET

This is an extract from the *Stuart News* related to the homicide of Crystal Lynn McGrath. This information is provided in an effort to accurately depict the events of this case.

Charlotte May Puffinberger, sister of Crystal, is caught in the middle of a custody battle between Cheryl Puffinberger (her mother) and the Hoopaughs (Carl Puffinberger's mother & step-father).

Carl is currently serving a 10 year prison sentence for second degree aggravated child abuse. Cheryl was sentenced to 9 months for misdemeanor charges (already served). There has been no "termination of rights" of either parent.

THE STUART NEWS

June 6, 1989

9-month jail term handed down in fatal abuse case

By Tim Roche of the News staff

STUART—A judge Monday sentenced Cheryl Puffinberger to nine months in county jail for allowing her husband to punch, kick, slap and torture her $3^1/_2$-year-old daughter, Crystal Lynn McGrath, before the child's death last fall.

Puffinberger, 24, last week pleaded no contest to reduced charges of misdemeanor child abuse after reaching an agreement with prosecutors. She had been charged with child abuse by neglect, a felony.

"There's nothing that anybody can do to bring the child back, and there's nothing anybody can do to punish you anymore," Circuit Judge Robert Makemson told Puffinberger during the sentencing.

The judge said he felt compelled to send a message that child abuse must be reported.

Puffinberger likely will be jailed for a little more than five months, attorneys said. The judge ordered that she receive credit for the three months she's already served since her arrest.

Her husband, Carl, was sentenced to 10 years in prison in May after he pleaded no contest to aggravated child abuse for beating Crystal between Oct. 1, 1987, and Nov. 21, 1988.

Prosecutors last week said murder charges in Crystal's death seem unlikely. Investigators have found evidence that both Puffinbergers were abusive to the child.

The youngster reportedly told conflicting stories on Nov. 22, the afternoon that she was taken to Martin Memorial Hospital. Crystal first told nurses her mother had abused her, then later pointed the finger at her stepfather.

"The truth of that child's death lies in heaven," Assistant State Attorney John Spiller said. "The punishment for that child's death rests in the county jail."

Cheryl Puffinberger had been expected to be sentenced to a year in the Martin County Jail as part of the plea bargain with prosecutors.

But her attorney, Ronald Smith of Stuart, asked the judge to be lenient Monday.

"I see no other reason other than pure punishment to put her back in jail," Smith said. "She's suffered enough."

Puffinberger told the judge Monday that she was trying to rebuild a lost relationship with an 11-month-old daughter placed in foster care after the mother's arrest in January.

Every week since she was released on $1,500 bail in April, Puffinberger said she has visited the youngster, Charlotte May. She hopes to be reunited with the child once she served her time in jail.

In arguing for a shorter sentence, Smith said the state Department of Health and Rehabilitative Services, would limit Puffinberger's visits with Charlotte May to once a month while the mother is in jail.

Charlotte May's future remains legally tangled as well. A county judge will consider this summer whether the youngster should live with her paternal grandparents.

Carl Puffinberger's mother and stepfather, Alice and Alvin Hoopaugh, said Monday that they have asked for temporary custody while the child's parents serve time in jail.

But Spiller, the prosecutor, said he didn't think Cheryl Puffinberger would be ready for parenting again after serving five or six months in jail.

Spiller said he has interviewed a witness who overheard Cheryl Puffinberger scream obscenities at Charlotte only

a week after the child was born. Spiller, however, has no jurisdiction in family court.

The Hoopaughs, who attended Monday's sentencing, have said they knew that Crystal was being abused by her mother and stepfather.

On Monday, they said Carl Puffinberger was taking the blame for his wife.

"I know Carl told her not to worry if it ever came down to them filing murder charges," Alice Hoopaugh said.

The Hoopaughs also said they considered Cheryl Puffinberger's sentence to be too light.

"They give one of them 10 years and one nine months. That's not fair," Alvin Hoopaugh said. "If they don't know who did it, give them both 10 years."

THE STUART NEWS

March 10, 1990

State: Couple unfit to parent

By Tim Roche of the News staff

STUART—State welfare officials said Friday they're taking steps to place 1 1/2-year-old Charlotte May Puffinberger for adoption by asking a judge for court hearings in which the youngster's parents would be declared unfit and lose their custody rights.

Janice Gammill and Patricia Santiago, attorneys for the state Department of Health and Rehabilitative Services, notified Circuit Judge Paul Kanarek of their intentions during a closed-court hearing Friday in Stuart.

Charlotte May has been a ward of the state since she was about 4 months old, since the day in November 1988 when her half-sister Crystal Lynn McGrath was killed.

Her parents, Carl and Cheryl Puffinberger, were sent to jail last summer after pleading no contest to child abuse charges in connection with the death. The mother has been released and was in court Friday to ask the judge to be reunited with her child.

But HRS attorneys said Friday that Cheryl Puffinberger still hasn't met the standards outlined in a "performance agreement" with social workers who've been monitoring the case.

Cheryl Puffinberger hasn't demonstrated that she's able to be rehabilitated into being a good parent, Gammill said.

Gammill said HRS next plans to send documents telling Carl Puffinberger, who's serving a 10-year term in Marion Correctional Institution in northern Florida, that his parental rights also may be jeopardized.

Charlotte May would be eligible for adoption if the judge so rules after a two-part hearing in which HRS attorneys will present evidence supporting their recommendation, Gammill said.

But Ron Smith, a Stuart attorney representing Cheryl Puffinberger, said Friday that the mother intends to battle HRS over custody of the youngster. He refused to elaborate, citing state statutes that prevent him from discussing the pending custody case.

"What I can tell you is that Cheryl has been working with HRS on their performance agreement," Smith said. "Cheryl is doing her best. She's being going to classes and everything. She's been doing what they've wanted her to do."

Carl Puffinberger's mother and stepfather, Alice and Alvin Hoopaugh of Stuart, also want custody. They've been talking to social workers for months, hoping they can raise their granddaughter while Carl serves out his 10-year prison term.

But the Hoopaughs said Friday that HRS hasn't taken them seriously. They vowed to fight the agency and the judge if Charlotte is put up for adoption.

"HRS has got to whop me till I can't breathe to take that child away," said Alvin Hoopaugh, 30. "They're trying to take a part of my life from me. I'm not going to stop fighting. If I have to sell my house, I will. I'll get another job if I have to."

In the meantime, state officials said they've been inundated with letters asking them to monitor the custody case.

The Rev. Gary Durham, senior pastor at the Stuart Church of the Nazarene, has said more than half of his 275-member congregation have taken an interest in Charlotte's case and have written to legislators and senior HRS administrators.

"If you make a little noise, you might get a little attention," Durham has said. "We're not trying to become judge and jury. We're just saying that somebody has got

to be aware of the dangers involved here. A child's life could be at stake."

George and Gayle Swift, who kept Charlotte May for a year before deciding to leave the foster care program, have said the terrified look they remembered in Charlotte's wide blue eyes forced them to get involved.

"The only thing that could be worse than what happened to Crystal is letting Charlotte go back to her parents," Gayle Swift has said. "We don't want Crystal's death to be in vain. We would hope the hell Crystal went through would be enought. It's not worth taking another risk."

THE STUART NEWS

May 18, 1990

Fight for kid begins

Puffinberger says she's fit to parent

By Tim Roche of the News staff

STUART—Cheryl Puffinberger clutched a tissue and blotted away tears she shed for the two daughters she lost 18 months ago—one girl to an abusive husband, she says, and the other to the state's foster-care system.

In an interview Thursday, Mrs. Puffinberger talked about lessons she has learned since the November 1988 beating death of her oldest daughter, 3½-year-old Crystal Lynn McGrath. She also talked about how she'll try to persuade a judge next week to reunite her with her other daughter, 1½-year-old Charlotte May Puffinberger.

"I would like to think I could get a second chance to parent Charlotte," she said. "I think it's going to be bitter next week. I'm trying to prepare myself the best I can."

Wearing a locket with a miniature photograph of Charlotte, Mrs. Puffinberger talked to reporters for the first time since Crystal's death. During the interview at her attorney's office, there were no questions she wouldn't answer. Several questions provoked a steady stream of tears.

At a court hearing Monday and Tuesday, Mrs. Puffinberger will challenge the state Department of Health and Rehabilitative Services in its effort to terminate her parental rights. HRS has asked Circuit Judge Paul Kanarek to place Charlotte May up for adoption.

HRS attorneys have described Mrs. Puffinberger as an unfit mother, saying she hasn't met standards outlined in a "performance agreement" with social workers monitoring the case. The requirements included attending parenting classes, assertiveness courses and special counseling.

Charlotte May has been a ward of the state since her sister died Nov. 23, 1988. She visits her mother for 30

minutes every week in a social worker's office at the HRS center on East Seventh Street in Stuart.

The last time the youngster was living with her mother, she began flipping from her back to her stomach. Now she's walking and practically talking.

"That's what I think visitation is good for—getting to know my daughter. Not only bonding with her, but getting to know her," said Mrs. Puffinberger, 23.

Since her release from jail last September after pleading no contest to neglect charges, Mrs. Puffinberger said she's been thinking about the past and concentrating on the present.

For six weeks, she has had regular sessions with a Jupiter psychologist who is helping her overcome the loss of one daughter and separation from the other.

Still, she blames her former husband for both.

She said she believes Carl Puffinberger, whom she married in August 1987 and divorced last summer, killed Crystal by beating and kicking the youngster into convulsions.

Murder charges were not filed in the case because prosecutors said they were unable to determine which parent delivered the fatal blows. On her death bed at Martin Memorial Hospital, Crystal told one nurse that her mother had beaten her and another nurse that "the man who lives with mommy" was the one.

Mr. Puffinberger was sentenced to 10 years in prison in May 1989 after he pleaded no contest to aggravated child abuse charges. Police said he often tortured the youngster, punching her in the face and forcing her to stand on her head in the corner.

"I do have a lot of anger built up against Carl. I don't believe 10 years is enough for what he did to her," Mrs. Puffinberger said. "I know I didn't do it. My child was fine

when I left her with Carl. It was a heck of a shock to walk in and see bruises and tubes and everything at the hospital."

Mr. Puffinberger also will be the subject of next week's custody hearing. His court-appointed attorney, Steven Rogers, declined comment Thursday.

But in an interview last year, Mr. Puffinberger said he wanted his mother and stepfather to raise Charlotte May until his release from prison. He denied killing Crystal and directed accusations at his former wife.

Mrs. Puffinberger said she reported her former husband's violence in July 1988. She said she got little response from authorities, except for a state social worker who made some 19 home visits but never saw the children.

Now, HRS is trying to right its wrongs by taking the Puffinbergers to court, Mrs. Puffinberger said.

"If they had followed through, Crystal might still be here. Just like if I would've had the guts to report Carl again, Crystal might still be here," she said. "I think they're overreacting when they're trying to protect Charlotte from me. In my opinion, they're trying to make an example out of me."

Her attorney, Ronald Smith of Stuart, said Mrs. Puffinberger has met the conditions HRS set out in the performance agreement.

Smith contends that the agency is trying to terminate her parental rights because of the widespread community interest the case has drawn.

"I think Cheryl in the grand scheme of things is a fit parent. I've seen other kids go back to parents worse off than Cheryl with no termination of parental rights whatsoever," Smith said.

"It's obvious that HRS is saying, 'To make up for our mistake in Crystal's case, we've got to take this other child away to show people we're on the ball again.' "

But an HRS spokeswoman said Thursday that the agency is working for the child.

"We would never use a child for any kind of grandstanding effort. Our main concern is the child's safety and welfare," said Cam Freedlund of HRS district headquarters in West Palm Beach. "I think we were pretty upfront with the mistakes we made, and this in no way will take away from that tragedy.

"We've always had a commitment to children's best interest, and it's that commitment that will determine what course we'll take."

HRS has received more than 50 letters, including some from legislators, urging the agency to pursue adoption in the Puffinberger case. Kanarek, the circuit judge who will decide the child's fate, also has been swamped with letters and postcards.

The judge's judicial assistant, Sharon Puderer, said she's received as many as 45 postcards this week. They carry the same message: Remember Crystal in the quest to find Charlotte May a good home.

Mrs. Puffinberger said she, too, has adjusted to constant public criticism about the case. She's been harassed and called "baby-killer" to her face.

"For one thing, it hurts because these people know me by the papers. They don't *know* me," Mrs. Puffinberger said. "They don't know what I've been going through to get custody. They don't know if there's been any lessons learned."

No matter what happens next week, Mrs. Puffinberger said she'll continue to cope with her grief. And maybe one day, she'll be ready to buy a tombstone for Crystal's grave.

"That is like the final goodbye," she said. "I'm just not ready for that yet."

THE PALM BEACH POST

Friday, May 18, 1990

Mother who watched beatings wants daughter

Lawyer says woman not fit for custody

By Jill Taylor
Palm Beach Post Staff Writer

STUART—There is a tiny photograph of a smiling, blond-haired little girl in a locket around Cheryl Puffinberger's neck.

It is a picture of her daughter, Charlotte May, who will be 2 in July.

Next week, Martin Circuit Judge Paul Kanarek will be asked to decide whether Cheryl Puffinberger is fit to raise Charlotte.

"I would like to think that I could get a second chance," said Cheryl Puffinberger, who spoke publicly about her case for the first time Thursday.

She sees her daughter once a week in supervised visits at the state Department of Health and Rehabilitative Services office in Stuart.

Charlotte has been in foster homes since November 1988, when her $3^1/_2$-year-old half-sister, Crystal McGrath, was beaten to death.

Prosecutors called Crystal's death a murder and suspected her stepfather, Carl Puffinberger. But they said there wasn't enough evidence to prove the case in court and no murder charges were filed.

Carl Puffinberger pleaded no contest to beating Crystal before her death and is serving a 10-year prison term for aggravated child abuse.

Cheryl Puffinberger, 25, has since divorced Carl. She served six months in the Martin County Jail on a plea of no contest to a misdemeanor charge for failing to protect Crystal.

She had reported her husband for beating the child once but said Thursday she was afraid to report him again. She said he beat her, too.

"He would hit Crystal and then he would hit me because I would scream at him. He'd go, 'What are you going to do? Report me again?' "

Cheryl Puffinberger said she lied to the HRS worker assigned to check on Crystal, telling her that everything was fine when it wasn't. Cheryl Puffinberger said the case worker should have pushed a little harder and looked a little closer.

"If they had followed through, Crystal might still be here, just like if I'd had the guts to report Carl again, Crystal might still be here."

Attorney Karen Steger, who is representing Charlotte's guardian ad litem in next week's hearing, believes Cheryl's failure to protect her oldest daughter shows she is unfit to raise her youngest child.

"The child's best interests will be served by the child being placed for adoption," Steger said. "Mom knew what was going on. Mom protected Carl."

The medical examiner's report showed Crystal had 23 injuries, including three broken ribs and bruises over most of her body.

There were reports from neighbors after her death that they had seen bruises and witnessed some of the abuse, including times when Carl Puffinberger forced the child to stand on her head in the corner and beat her when she fell.

Cheryl Puffinberger said she saw her husband on different occasions whip the child with a belt, grab her by the hair, and throw her across a room. But she didn't recall the headstands and other incidents that were reported to investigators.

Cheryl Puffinberger said she never imagined her husband would become violent enough to kill Crystal. He told her Crystal had simply gone into convulsions.

"I mean it was one heck of a shock to walk in that hospital to see tubes and blood."

Crystal lived less than 24 hours after the beating.

Cheryl Puffinberger said she never knew the extent of the injuries and continued to believe the story about the convulsions until five months after the death, when she heard the details in a court hearing.

Attorney Ron Smith, who represented her in the abuse case and will also handle the custody issue, said Cheryl Puffinberger has worked hard since her release from jail to get a good job and do whatever HRS required.

A written agreement with HRS called for her to take classes in parenting skills and assertiveness training, and to see a counselor. She has complied.

THE STUART NEWS

May 23, 1990

Puffinberger child's future in judge's hands

By Tim Roche of the News staff

STUART—A judge will decide by Friday whether 1½-year-old Charlotte May Puffinberger should be reunited with her mother, who was jailed last year for not reporting the physical abuse that eventually killed the girl's older sister.

Circuit Judge Paul Kanarek could place Charlotte May for adoption if he sides with the state Department of Health and Rehabilitative Services in terminating parental rights to the youngster.

Kanarek listened to more than 12 hours of testimony in a special hearing that ended Tuesday after the girl's mother, Cheryl Puffinberger, took the witness stand for a third time.

Mrs. Puffinberger, 25, has said she hopes for "a second chance" to raise Charlotte May, whom she lost to the state's foster care program in November 1988 when her eldest daughter, Crystal Lynn McGrath, was beaten to death.

HRS attorneys have said Mrs. Puffinberger failed to meet standards outlined in a "performance agreement" with social workers monitoring the case. The hearing was closed to the public this week because of state laws requiring strict confidentiality in dependency matters.

"I hope the judge hangs his hat on the substantial compliance requirements in the performance agreement and the way substantial compliance is defined in the statutes," said Karen Steger, a Stuart attorney representing Charlotte's court-appointed guardian.

"Cheryl has still never acknowledged responsibility for anything, and it is our position that she could put the child back into an abusive situation again," Steger said. "It's

a really close call. It's hard to say how things went, but I feel better now than I have the last couple of days."

In the hearing, HRS attorneys presented evidence that Mrs. Puffinberger had given birth to three daughters in four years—two of whom died.

The infant deaths became an issue in the hearing this week as attorneys tried to portray Mrs. Puffinberger as unfit and unstable, Steger said. All three of Mrs. Puffinberger's children had different fathers, Steger said.

Charlotte May's father, Carl Puffinberger, gave up his paternal rights to Charlotte May minutes after the custody hearing began Monday. His attorney, Steven Rogers of Stuart, said Mr. Puffinberger hoped Charlotte May would be placed for adoption.

Mr. Puffinberger was sentenced to 10 years in prison last year after he pleaded no contest to aggravated child abuse charges for beating Crystal, his stepdaughter. Mrs. Puffinberger was given a nine-month jail term on neglect charges for not reporting the abuse.

Prosecutors were unable to file murder charges in the case because Crystal made conflicting statements on her deathbed. First she told a nurse that her mother abused her. Later, she said "the man who lives with mommy" was the assailant.

THE PALM BEACH POST

May 30, 1990

Mom loses fight for daughter

State will seek to place abused child for adoption

By Jill Taylor
Palm Beach Post Staff Writer

STUART—Cheryl Puffinberger did not "substantially comply" with an agreement she made with the state Department of Health and Rehabilitative Services and faces permanent loss of custody of her daughter, according to a judge's ruling Tuesday.

The order from Martin County Circuit Judge Paul Kanarek was sealed, but attorney Karen Steger, who represented the interests of 22-month-old Charlotte May Puffinberger in a hearing last week, said it brings the toddler a step closer to adoption.

"To know that this little girl is going to be safely placed—it's a great feeling," Steger said.

Cheryl Puffinberger could not be reached for comment. Her attorney, Ron Smith, did not return phone calls Tuesday.

HRS spokeswoman Cam Freedlund said she could not comment on the case other than to say that Kanarek's decision "is in the best interests of the child."

Charlotte has been in foster care since November 1988, when her 3½-year-old half sister, Crystal McGrath, died of injuries suffered in a beating.

Cheryl Puffinberger served about six months in jail for failing to report her husband's abuse of Crystal in the months before the child's death.

Carl Puffinberger is serving 10 years in prison for aggravated child abuse.

Prosecutors never filed murder charges in the case, saying they could not prove exactly when the fatal blows were struck and who was with the child at the time.

After her release from jail, Cheryl Puffinberger signed an agreement with HRS that she would attend parenting and assertiveness-training classes and counseling sessions.

In an interview earlier this month, Puffinberger said she finished the classes but said the counseling ended after about five sessions. Puffinberger said the therapist wanted her to admit to hitting Crystal and refused to schedule any more sessions when Puffinberger refused.

The therapist testified at a two-day hearing last week, but the courtroom was closed to the public.

Steger said it appeared Kanarek relied heavily on the legal definition of "substantial compliance" in his ruling.

The definition reads: "Substantial compliance means that the circumstances which caused the placement in foster care have been remedied to the extent that the well-being and safety of the child will not be endangered upon the child's being returned to the child's parent or guardian."

Although investigators believed Carl Puffinberger was primarily responsible for Crystal's injuries, Steger said there was nothing to show that Cheryl Puffinberger would do a better job protecting Charlotte than she did Crystal.

"Everything is basically the same as it was when Crystal died," Steger said.

In the earlier interview, Cheryl Puffinberger said she has divorced Carl and has no intention of marrying again any time soon.

"I know they are worried about something like that happening, especially if I should hook up with somebody that would turn out to be like another Carl," she said. "But, if I had a problem, I would assert myself instead

of becoming passive like I was in my relationship with Carl."

The next step is a disposition hearing set for June 15. At that hearing, Steger and HRS attorneys are expected to ask that Charlotte be placed for adoption.

However, Puffinberger has the option of appealing to the 4th District Court of Appeal.

THE STUART NEWS

May 30, 1990

Judge decides Puffinberger unfit to raise daughter

By Tim Roche of the News staff

STUART—A judge on Tuesday terminated parental custody rights to 1½-year-old Charlotte May Puffinberger, whose future has been uncertain since her older sister was beaten to death in November 1988.

Circuit Judge Paul Kanarek ruled that the youngster's mother, Cheryl Puffinberger, is unstable and unfit to care for her.

Kanarek criticized Mrs. Puffinberger for not reporting her former husband Carl Puffinberger's violent rages and abuse of 3½-year-old Crystal Lynn McGrath—her oldest child and his stepdaughter.

Crystal died of massive internal injuries including a ruptured spleen and three broken ribs.

Kanarek said Mrs. Puffinberger would "make up excuses" to hide the abuse from state social workers monitoring the case in the months before Crystal's death.

Mr. Puffinberger was sentenced to 10 years in prison for aggravated child abuse. Prosecutors never filed murder charges in Crystal's death because they said they were not able to determine which parent delivered the fatal blow.

Mrs. Puffinberger was sentenced to nine months in jail last year after pleading no contest to neglect charges for not reporting the violent acts that eventually caused her daughter's death.

"The evidence clearly and convincingly shows that Cheryl Puffinberger did nothing to protect Crystal McGrath from the abuse and or neglect by Carl Puffinberger," Kanarek wrote.

"The evidence further shows that Cheryl Puffinberger permitted Charlotte Puffinberger to live in an environment which caused the child's physical, mental or emotional health to be in danger."

Kanarek will determine in a special hearing June 15 whether to put Charlotte May up for adoption. That decision could be appealed to a higher court.

Kanarek's order was sealed from public inspection Tuesday because of state statutes requiring confidentiality in termination cases, but a copy was obtained by *The Stuart News/Port St. Lucie News*.

The ruling came a week after attorneys for the state Department of Health and Rehabilitative Services presented evidence showing Mrs. Puffinberger was not reformed enough to raise Charlotte May.

HRS attorneys accused Mrs. Puffinberger of not meeting standards set by a "performance agreement" that called for parenting classes and counseling before she could be reunited with her daughter.

Charlotte May has been in foster care since her sister died.

Mrs. Puffinberger declined to comment on the judge's decision late Tuesday afternoon, saying she was unaware of any order to eliminate her custody rights.

She referred questions to her attorney, Ronald Smith of Stuart. Smith did not return telephone calls Tuesday.

Mrs. Puffinberger said earlier that she hoped to be reunited with Charlotte May. She has said she wanted a "second chance" at raising the child.

Mr. Puffinberger gave up his parental rights to Charlotte May as the hearing to terminate custody began last week. His court-appointed attorney, Stephen Rogers of Stuart, applauded the judge's decision Tuesday.

"If she loved the child as much as he does, she would have consented to the termination like he did," Rogers said. "One of the reasons he even considered it was to be able to tell the full story, so that everyone would know the role she played in all the events. She's never been candid to this day about what happened to Crystal."

The ruling was welcomed by other child-welfare advocates who said they feared Charlotte May would be placed back in her mother's care where her future would be jeopardized.

"It would have been a travesty for the judge to give the kid back," said Stuart attorney, Karen Steger, who represented Charlotte May's court-appointed guardian. "Substantial compliance with the performance agreement was the key. That was the narrow area (the judge) had to address. I'm happy with the decision."

Pamela Kirkland said she, too, was pleased with the decision. Kirkland, a foster parent in Lakeland, Fla., has become one of the state's most outspoken critics of children services.

"It's hard every time a mother loses a child. But sometimes moms have to love their children enough to let them go," said Kirkland, whose foster son, Bradley McGee, was returned by HRS personnel to his parents in 1989. Bradley died shortly after the return when police say his father dunked the child's head repeatedly into a toilet.

"I hope the judge's decision would send a message that it's always best to err on the safety of the child," she said. "It should be child protection before reunification at all costs."

PAUL B. KANAREK
CIRCUIT JUDGE

Indian River County Courthouse
Suite 239
2145 14th Avenue
Vero Beach, FL 32960

(407) 567-8000

State of Florida
Nineteenth Judicial Circuit

June 8, 1990

Honorable Bruce H. Colton
State Attorney Nineteenth Judicial Circuit
P.O. Box 4401
Ft. Pierce, Florida

Re: In The Interest of: Charlotte Puffinberger
Case No. 88-981-A

Dear Mr. Colton:

I recently presided over a two day trial involving a petition to terminate the parental rights of Cheryl Puffinberger. On Tuesday, May 29, 1990, I entered an Order in that case. Copies of the Order were provided to Mr. Ronald Smith, attorney for Mrs. Puffinberger; Karen Steger, attorney for the Guardian Ad Litem; and to Patricia Santiago, attorney for Health and Rehabilitative Services. On Wednesday, May 30, 1990, the Stuart News published a story written by Tim Roche *which extensively quoted from my Order* and stated that the newspaper had obtained a copy of my Order. The Stuart News article also *quoted Karen Steger*. The Palm Beach Post also wrote an article which quoted Ms. Steger. [Hand underscoring in copy provided by State Attorney.]

Section 39.467(5), Florida Statutes (1989), provides that all hearings involving the termination of parental rights are to remain confidential and closed to the public. Section 39.471, Florida Statutes (1989) makes all court records closed from public inspection and also provides that information obtained by certain persons is to be confidential.

On June 4th I received a letter from Mr. Smith (a copy of which is attached) which included the newspaper articles which were written about this case. On April 5th I received a letter from Ms. Steger concerning this matter. I have enclosed a copy of this letter.

It appears that the disclosure of the Court's Order and the statements made by counsel may constitute violations of Chapter 39 and as a result be punishable as indirect criminal contempt. As the chief law enforcement officer of this circuit I request that you immediately investigate this matter and report your findings to the Court.

Sincerely,

/s/ Paul B. Kanarek
PAUL B. KANAREK

PBK/scp

cc: Karen Steger, Esq.
Ronald Smith, Esq.
Patricia Santiago, Esq.
Clerk of Court

STEWART/WAXLER & SMITH

AN AFFILIATION OF PROFESSIONAL ASSOCIATIONS
73 S.W. FLAGLER AVENUE
STUART, FLORIDA 34994
FAX: (407) 283-4396

June 1, 1990

Honorable Paul B. Kanarek
Circuit Court Judge
Indian River County Courthouse
2145 14th Avenue, Suite 239
Vero Beach, Florida 32960

Re: In The Interest Of: CHARLOTTE PUFFINBERGER
Case No. 88-981-A

Dear Judge Kanarek:

As an officer of the Court, counsel for Cheryl Puffinberger and in compliance with my ethical obligations, I am providing the Court with the following:

1. Headlines and article contained in The Stuart News dated Wednesday, May 30, 1990, written by Tim Roche.

2. Headlines and article contained in The Palm Beach Post dated Wednesday, May 30, 1990, written by Jill Taylor.

It is obvous that someone provided these newspapers and writers with a copy of your "confidential" Order rendered on May 29, 1990, after the two day "confidential" hearing.

Conspicuously, it appears that one "party" breached the confidentiality requirement and freely commented about this Court's ruling and what it means. This is in direct contempt of this Court's admonishment about confidentiality and in direct violation of Florida Statutes §39.467(5) and §39.471.

I am also enclosing copies of newspaper articles from the Stuart News of May 22nd and 23rd, 1990, in which, apparently, a State witness, Kevin Twombly, freely commented about what his testimony had been at the confidential hearing and in which, apparently, Karen Steger, Esquire, told reporter Tim Roche about certain aspects of what took place in the "confidential" hearing.

I think this Court should be very concerned about these direct, intentional breaches of the law and ethics and I would hope that this Court will exercise its substantial powers to determine what sanctions should be levied and against whom.

Sincerely,

/s/ Ronald B. Smith
RONALD B. SMITH

RBS/lr

cc: Patricia C. Santiago, Esq.
Karen O'Brien Steger, Esq.

STEGER & STEGER, P.A.

ATTORNEYS AT LAW
PHONE: (407) 287-8388
FAX: (407) 220-3518

SAM T. STEGER
KAREN O'BRIEN STEGER
JOSEPH NEGRON, JR.

SUITE 310
FLORIDA NATIONAL BANK BUILDING
301 EAST OCEAN BOULEVARD
STUART, FLORIDA 34994

June 5, 1990

Honorable Paul B. Kanarek
Martin County Courthouse
120 E. Ocean Blvd.
Stuart, FL 34994

RE: In The Interest of Charlotte May Puffinberger
Case No. 88-981 A
Martin County Circuit Court Case

Dear Honorable Judge:

In response to Ronald Smith's letter to you dated June 1, 1990, I am writing to tell you that I did not give a copy of the ruling on the above referenced case to Tim Roach or any other reporter. I told Tim Roach that in my opinion I could not disclose any aspects of the ruling pursuant to Florida Statutes. I said that the way I read the statute, no one is allowed to disclose any facts about the case.

Mr. Roach telephoned me on the evening the ruling came out and said that he was obtaining a copy of said ruling from someone else.

Further, I agree with Ronald Smith, that whoever gave a copy of the ruling and/or details of same should be sanctioned. However, it was not me.

Thank you for your attention to this matter.

Sincerely,

/s/ Karen O'Brien Steger
KAREN O'BRIEN STEGER

KOS:lwc

cc: Ronald Smith, Esq.
Patricia Santiago, Esq.

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

CASE INITIATION

INITIATED BY: CSAI David Powers
DATE: June 12, 1990

COUNTY OF ORIGIN: Martin
CASE #: S90/06010ISC

CASE TITLE: MARTIN COUNTY CIRCUIT COURT
CASE TYPE: Allegation of Criminal Contempt

REPORT BY: /s/ DPP
CSAI David P. Powers
APPROVED: _____
Chief Investigator

COPIES TO:

VICTIM:
NAME: _____
ADDRESS: _____
_____
TEL. # (home) _____
(bus) _____

SUSPECT:
NAME: _____
ADDRESS: _____
_____
TEL. # (home) _____
(bus) _____

SYNOPSIS: As per the direction of State Attorney Colton, an investigation was requested by Judge Paul Kanarek, Circuit Court Judge in Martin County, regarding the improper disclosure of Court Order in the Cheryl Puffinberger case.

CASE OPEN

OFFICE OF THE
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Nineteenth Judicial Circuit of Florida
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and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: June 13, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 2:00 P.M., June 12, 1990, conferred with State Attorney Colton regarding the above case with the following results.

The main issue appears to be identifying the individual responsible for turning over a copy of the sealed Court Order in the Cheryl Puffinberger case. This Court Order was quoted extensively by reporter Tim Roche of the Stuart News on May 30,. 1990. Extensive quotes by Attorney Karen Steger were also in the story as well as statements by HRS spokeswoman Cam Freedland.

State Attorney Colton directed that Chief Assistant State Attorney Dave Phoebus be assigned to the case to initially research the area dealing with the legal issues surrounding the confidentiality of information obtained by reporters. Upon completion of his review interviews will

be set up with all persons involved in the Puffinberger case.

INVESTIGATION CONTINUING

OFFICE OF THE
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Nineteenth Judicial Circuit of Florida
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and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: June 14, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 11:00 A.M. this date, the undersigned conferred with Chief Assistant State Attorney Phoebus regarding the subject case.

CASA Phoebus advised that he had spoken with Judge Kanarek regarding the preparation and dissemination of the mentioned Court Order with the following results: Judge Kanarek stated that the evening after the Puffinberger hearing he had prepared an original copy of the Order on his personal computer at his residence. The following day he brought this original to the Juvenile Clerk's Office for filing. Since Judge Kanarek was extremely concerned over the confidentiality of the Court Order he first went to the xerox machine outside of his office and personally xeroxed three (3) copies of said Order. These were then brought to the Juvenile Court Clerk and the three copies of the Order were sealed in an envelope and ad-

dressed to: 1) Attorney Karen Steger, attorney for Guardian Ad Litem, 2) Attorney Patricia Santiago, attorney for HRS and 3) Attorney Ron Smith representing Mrs. Puffinberger. The clerk, allegedly, then personally handed these envelopes to each attorney or representative. The only other copy (original) had been sealed by Judge Kanarek and turned over to the clerk for filing.

CASA Phoebus preliminarily spoke with the Juvenile Clerk (name unknown) who advised him that she had personally placed the sealed envelope in a locking cabinet and retained the only key to same. She further stated that she did not leave the office until the end of the business day and that no one had access to the cabinet.

It is anticipated that all persons coming in contact with the Order, both in the courthouse complex and various attorneys' offices, will be contacted and statements obtained by this investigator. CASA Phoebus will continue to research the area of possession of the sealed document by the Stuart News reporter, Tim Roche.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
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Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin DATE: June 15, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt REPORT BY: CSAI David P. Powers/sme

COPIES TO: APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At approximately 9:00 A.M. this date the undersigned was present at the Martin County Courthouse complex, East Ocean Blvd., Stuart, Flordia for the purpose of interviewing individuals having some form of contact with the Puffinberger Order.

As a matter of professional courtesy, first attempted to speak with Chief Clerk Marcia Stiller to advise her of the subject investigation and that members of her staff were to be interviewed as to their involvement in the subject case. Mrs. Stiller was not in at the time and her secretary, Elsie, directed me to Joanne Brown, Director of Criminal Services for Martin County Court. Arrangements were then made with Mrs. Brown to interview Juvenile Clerk Carol Tilton, the person who had received the Order from Judge Kanarek on the morning of May 29, 1990 and also Ms. Tammy Franklin, who also worked in the same office

as Mrs. Tilton on the day in question. Upon first contact, Mrs. Tilton was hesitant about giving an interview due to prior conversations with Marcia Stiller and Chief Assistant State Attorney Dave Phoebus. However, after speaking with CASA Phoebus on the telephone, she agreed to give the interview.

Ms. Tilton initially stated that she recalled Judge Kanarek arriving at her office on the day in question with an original and two (2) copies of the mentioned Court Order. Ms. Tilton then stated that she xeroxed another copy, placing each of the copies into an envelope and marked each with the recipient's name (Ron Smith, Karen Steger and Pat Santiago). She also recalled that Ms. Steger picked up the envelope in person as well as Ms. Santiago, who arrived with Ms. Betty Baum of HRS. Ron Smith's envelope was picked up by his secretary, Lynn Rusin. When asked if she had shown the Order to anyone, Ms. Tilton replied in the negative. She also stated she had not xeroxed any additional copies and had specifically not given a copy to anyone else, including reporter Tim Roche.

Upon completion of the Tilton interview, Ms. Tammy Franklin, who worked in the same juvenile office was interviewed with the following results. She stated that she recalled the day Judge Kanarek had come to the office and had talked to Ms. Tilton about the Order after the judge had left. Ms. Franklin advised that during this discussion about the contents of the Order, Ms. Tilton xeroxed a copy of said Order and gave it to her. She stated that she had started to read it but became busy and put it into her desk with her purse. It remained in her unlocked desk until the end of the business day when she removed it and took it home with her. She further advised that the Order remained in her automobile until the following day when she returned to work at which time she read the Order and returned it to Ms. Tilton, who then destroyed it.

Based upon Ms. Franklin's statements, another statement was taken of Ms. Tilton. She was advised that based upon her untrue statements under oath, she had, in fact, committed perjury. She then admitted that she had given a copy of the mentioned document to Tammy Franklin. She also stated that she had xeroxed an additional copy for Ms. Fromang (phonetic) of HRS who had asked her for a copy. Tilton stated that she had checked with Judge Kanarek if she could release it to Fromang. Judge Kanarek advised her that she could not so she destroyed that copy. Tilton then admitted that she had also allowed Julie Anne Rodenberry-Sherman, a Circuit Court supervisor to read the Order. No further admissions were made by Ms. Tilton and she had no answer as to why she had lied under oath.

Mrs. Rodenberry-Sherman was then interviewed regarding the Order. She stated that she had gone to the juvenile clerk's office and had spoken with Ms. Tilton. She had been shown the Order by Tilton, after which she returned it to her. She also recalled the following day, after seeing the news article written by Tim Roche, that Ms. Tilton had gotten upset over the fact that the information contained in the Order had been released to the press.

An interview was also conducted on a friend of Tammy Franklin's one, Brenda Chapman, also an employee at the Martin County Courthouse. She had no knowledge of the Court Order and had no contact that day with Ms. Franklin.

Ms. Janice Gammill, Senior Attorney with HRS - West Palm Beach Office, was also interviewed and advised that she had received a copy of the Order via fax machine at her West Palm Beach office. She recalled that the only three people other than herself, who had knowledge of the Order's contents, were a paralegal, Katherine Thomas, a public relations supervisor, Cam Freedlund and Ms. Gammill's immediate superior, Laurel Hopper. Ms. Gammill also recalled that reporter Tim Roche had previously called her

and she remembered that they had "a heated discussion" as to his attempting to obtain information regarding the Puffinberger case. She stated she had "chewed him out" over the phone and refused to discuss any aspect of the case which was presently in trial.

Ms. Lynn Rusin, secretary for Attorney Ron Smith, was interviewed and stated that she had picked up the envelope at the Clerk's Office, brought it back to her office and after opening it, placed it on Mr. Smith's desk. She recalls not xeroxing any copies at that time and absolutely not giving one to Mr. Roche.

On June 18th, 1990, statements were also obtained from Attorneys Karen Steger and Ron Smith as follows:

Ms. Steger stated that she had personally picked up the sealed envelope from Carol Tilton at the courthouse on May 29, time unknown. She did, however, state that Roche appeared at her office at approximately 6:15 P.M. and at that time had requested Ms. Steger give him a copy of the Court Order. After she refused, he stated that he knew where he could get a copy and that he would call her that evening when he got it. He called Ms. Steger at approximately 8:30 P.M. that same night and told her that he had obtained a copy from "someone at HRS," who he would not name. He did state that this individual viewed the statute differently than Ms. Steger.

On this same date, Attorney Ron Smith gave a statement indicating that he received his copy of the Order the afternoon of May 29th. He recalled making a copy for Mrs. Puffinberger but that this occurred a few days after the article appeared in the Stuart News. He did, however, recall that Tim Roche had called his office at 5:13 P.M. that date and left a message with the receptionist indicating if Ron Smith wanted to know what was in the Court Order, he would read it to him.

The above statements were taken under oath and have been transcribed for inclusion in the subject case folder.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: June 18, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 3:50 P.M. this date called Tim Roche (220-2007) and advised him that I wished to take a statement regarding the Puffinberger Court Order Issue. He advised that he had already anticipated this and spoke with his Managing Editor, Nancy Smith, who told him to refer everything to her. I was transferred to Smith who stated that Roche would decline to be interviewed.

Ms. Smith was asked who was the attorney for The Stuart News and indicated that it was Bruce Wilkerson, who was not aware of the circumstances surrounding the Puffinberger issue. She stated she would confer with Wilkerson and have him contact this office.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
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Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: June 19, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At approximately 2:30 P.M. this date received a telephone call from Katherine Thomas at HRS - West Palm Beach Office. She stated that upon checking with Administrative Secretary Ruby Parkinson, who handles the fax machine in the course of her daily duties, it was found that no fax log is maintained for paperwork being sent from that office.

INVESTIGATION CONTINUING

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and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: June 19, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At approximately 9:30 A.M., June 19, 1990, spoke with Ms. Janice Gammill, Assistant District IX Legal Counsel - HRS, West Palm Beach, telephone 837-5112, regarding individuals coming into contact with the Puffinberger Court Order after it had been faxed to the West Palm Beach HRS office.

Ms. Gammill advised that she had been present at the fax machine when her secretary (and paralegal), Katherine Thomas, had told her that an Order was coming through for her. The fax was received at 2:52 P.M., May 29, 1990. (Note: A copy was faxed to this investigator for inclusion in the case file.) The fax machine is located in the reception area of that office. After receipt, Ms. Thomas read the Order and gave it to Ms. Gammill. Ms. Gammill then showed it to Public Information Officer Cam Freedlund

and explained its contents. She also showed it to her supervisor, Laurel Hopper.

When asked if she still had the fax copy, she initially stated that she did, but upon closer inspection she found that her copy was a xerox and not a fax sheet(s). Although she does not recall why a copy was xeroxed, she believed that Ms. Hopper may have had Ms. [Thomas] copy one for her since fax copies tend to fade.

The HRS address is 111 Georgia Avenue, West Palm Beach, Flordia 33401.

Additionally, on this date, a request for toll information was made for telephone numbers 407-837-5111 and 407-837-5106 (Fax) in order to determine if a copy of said Order had been possibly faxed to anyone outside of that office. Also Ms. [Thomas] was contacted and a request made for a fax computer printout detailing material sent out of the HRS office on the day in question (May 29) subsequent to the receipt of the Puffinberger document.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
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Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: June 22, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 11:15 A.M. this date, the undersigned received a telephone call from Attorney Ann Noble with the law firm of Baker-Hostetler, Washington, D.C., telephone number 202-861-1681.

Ms. Noble called to advise this office that her firm represents all Scripps Howard Newspapers in the country and wished for a clarification as to the reasons why Mr. Tim Roche was requested to give a statement. After being advised of the circumstances surrounding the Puffinberger case and the fact that Chief Assistant State Attorney Phoebus would be out of town for approximately two weeks, she stated that she would call back to confer with both CASA Phoebus and the undersigned on July 3, 1990.

INVVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: July 09, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At approximately 4:00 P.M. this date, the undersigned contacted Ms. Jane Vernon (283-3136) in a further attempt to identify the person responsible for Faxing the Court Order to the West Palm Beach Office.

Ms. Vernon checked the Puffinberger file in order to ascertain if a cover sheet showing the person sending the Fax was present with negative results.

Ms. Vernon also stated that she had a printout showing all messages sent from the Stuart HRS Office via the Fax machine. This material was Fax'd to this office and reviewed. It reflected the fact that the first message on May 29, 1990 was sent at 22:51 hours (10:51 P.M). When questioned about earlier transmissions, Ms. Vernon stated that there was no record available since these transmit records were routinely destroyed.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: July 09, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At approximately 3:00 P.M. this date, the undersigned spoke with Ms. Patricia Santiago regarding the identity of the individual at the Martin County HRS Office who had Fax'd the subject Order to the West Palm Beach Office at Ms. Santiago's direction.

It should be noted that interview of Ms. Jane Vernon, Ms. Santiago's secretary, and the records of HRS at West Palm Beach indicated that Ms. Vernon could not be the person who fad Fax'd the items to HRS - West Palm Beach, since she had taken the day (May 29, 1990) off. It was Ms. Santiago's best recollection during her interview that she had given it to Ms. Vernon to Fax.

Ms. Santiago now stated that it was possible that she, herself, might have Fax'd the material to West Palm Beach

but she could not be positive. She could not recall giving the Order to anyone else at the Stuart HRS office.

INVESTIGATION CONTINUING

OFFICE OF THE

State Attorney

NINETEENTH JUDICIAL CIRCUIT OF FLORIDA
SERVING
INDIAN RIVER, MARTIN, OKEECHOBEE
AND ST. LUCIE COUNTIES

411 South Second Street
Fort Pierce, Florida 34950
(407) 465-3000

BRUCE H. COLTON
State Attorney

July 10, 1990

Mr. Robert Williams
District Administrator - HRS
111 George Avenue
West Palm Beach, FL 33402

Dear Mr. Williams:

In previous correspondence I had advised you of this office's investigation into the circumstances surrounding the improper release of a sealed court order involving a juvenile, CHARLOTTE M. PUFFINBERGER. At that time I had requested voluntary polygraph examinations of a number of your employees, these being Janice Gammill, Katherine Thompson, Laurel Hopper, Patricia Santiago and Cam Freedlund. In your letter of response, dated June 28, 1990 you indicated that these employees have declined to be tested.

I have just completed interviewing the remaining HRS personnel, all of whom are assigned to the Stuart Office. I am, therefore, again requesting that these other HRS employees voluntarily submit to a polygraph. The individuals concerned would be Jane Vernon, Secretary; Lila Daniels, Caseworker; Robin Kloster, Foster Care Worker; Betty Segebarth, Adoptions and Greg Daniel, Investigator. Please be aware that I have advised all of the above employees to discuss the situation with you or your designee, prior to making any decision relative to the polygraph examination.

I would greatly appreciate your assistance in determining whether these employees wish to be so tested and to advise me of their decisions so that this investigation can be concluded in a timely fashion.

If you have any questions relative to this matter, I can be contacted during normal business hours. Thanking you in advance, I remain,

Sincerely,

/s/ David P. Powers
David P. Powers
Chief Investigator

DPP:sme

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: July 12, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 9:15 A.M. this date, the undersigned spoke with Martin County Chief Clerk Marsha Stiller regarding this office's request to polygraph certain members of her staff who had come into contact with the Puffinberger court order.

Of all the individuals requested to voluntarily submit to a polygraph, only one, Tammy Franklin, declined the offer. All of the other employees of the Clerk's Office, previously interviewed, indicated they would be willing to be tested. These employees are: Carol Tilton, Brenda Chapman and Julie Ann Rodenberry-Sherman.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: July 12, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 3:00 P.M. this date, the undersigned contacted Attorney Ron Smith at his office reference the subject case. At that time he was requested to voluntarily submit to a polygraph examination regarding the Puffinberger issue. Mr. Smith stated that he was agreeable to taking the test.

In addition, Mr. Smith's secretary, Lynn Rusik, was also requested to take the examination to which she agreed.

At 5:00 P.M. this date, spoke with Attorney Karen Steger regarding this office's request for her to voluntarily take a polygraph. Ms. Steger stated she was agreeable to taking the test.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: July 12, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: On this date, spoke with Chief Clerk Marsha Stiller re the subject investigation with the folowing results:

Mrs. Stiller was advised that this office, as part of the ongoing investigation, was requesting polygraph examinations of the following Clerk's Office personnel: Carol Tilton, Tammy Franklin, Brenda Chapman and Julie Ann Roddenberry-Sherman. It was also impressed upon Mrs. Stiller that these polygraph examinations would be voluntary in nature.

Mrs. Stiller stated that she would contact the above employees, determine what their postion was relative to voluntarily taking said test, and contact this investigator as expeditiously as possible.

In addition a taped statement was taken at 9:30 A.M. this date of Attorney Joe Negron, an associate with the law firm of Steger and Steger. The basis for this statement was to corroborate a conversation he had had with reporter Tim Roche at the Steger law offices on the day in question (May 29, 1990).

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: July 18, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: As of this date, all of the individuals who had come into direct contact with the subject Court Order have been identified and interviewed. These include attorneys, secretarial personnel, court clerks and HRS employees.

The Order in question along with two (2) copies was initially delivered to Carol Tilton, Supervising Clerk, Juvenile Division, Martin County Courthouse, by Judge Kanarek at approximately 9:30 A.M., May 29, 1990. Ms. Tilton Xeroxed an additional copy and placed the three (3) copies in envelopes to be picked up by: A) Patricia Santiago, HRS, B) Karen Steger, Attorney and C) Ron Smith, Attorney. Ms. Tilton then contacted each of the above persons and requested that they come to the Clerk's Office to personally pick up the Order. Ms. Tilton then stated that she locked the original Order in her cabinet at her office.

With regard to the copy given to HRS Attorney Santiago, she appeared at the courthouse accompanied by Ms. Betty Segebarth of the Adoptions Unit of HRS. The document was read by both at the Clerk's Office and then brought to the HRS office on 7th Street in Stuart. At that time it was shown to a number of HRS employees who read it. It should be noted that some state they read it in its entirety, others perfunctorily. None of these employees, according to Ms. Santiago, had the opportunity to Xerox a copy of the Order—most, however, would have had a basic working knowledge of the contents of the Court Order. All of the Stuart HRS employees have denied any contact with Mr. Tim Roche of the Stuart News with regard to the subject Order. Attorney Santiago then had the Order Faxed to the West Palm Beach office of the HRS at the direction of her superior, District Legal Counsel Laurel Hopper at that office. The Fax was received by Ms. Hopper's secretary, Catherine Thomas, who had been alerted that the Fax was on its' way. She (Thomas) remained at the Fax machine, along with Public Information Coordinator-HRS, Cam Freedlund, until the entire Order was received. A copy was then made by Ms. Thomas for her supervisor, Ms. Hopper, placed in the Puffinberger file and left on Ms. Hopper's desk. It does appear, however, through interviews of the West Palm HRS personnel that two (2) additional copies were, in fact, made and distributed to Ms. Freedlund and Ms. Janice Gammill, Senior Attorney, HRS, West Palm Beach office. Secretary Catherine Thomas did not, during her interview, recall Xeroxing these additional copies. With regard to any contact with Mr. Roche on the day in question, all of the HRS personnel, both from the Stuart and West Palm Beach offices, have denied having any contact, either personally or telephonically.

The envelope for Attorney Ron Smith was picked up by his secretary, Lynn Rusin, after being advised by Clerk Carol Tilton that it was ready. Ms. Rusin responded to

the courthouse, opened the envelope, briefly read the title and then returned to her office where she placed the Order, still in the envelope, on Attorney Smith's desk. A copy of the Order was subsequently Xeroxed for Mrs. Puffinberger but was not released to her on the day in question. Attorney Smith and Ms. Rusin both state that they have had no contact with Tim Roche as to the Court Order.

The third envelope for Attorney Karen Steger was personally given to her by Clerk Carol Tilton after a call had been placed to Ms. Steger advising her that the Order was ready to be picked up at the Clerk's Office. According to Ms. Steger, she returned to her office and involved herself in appointments with various clients. She recalled Tim Roche appearing at her office at approximately 6:30 P.M. on the evening in question and during a brief conversation with her, had asked for a copy of the Court Order. Ms. Steger stated that she had declined, citing the appropriate statute prohibiting dissemination of this type of material. Roche then stated to her that he would be able to get it from someone else and would call her later that evening when he got it. Ms. Steger received a telephone call from Roche at her home at approximately 8:30 P.M. and at that time he told her that he had obtained a copy from "someone in HRS" who had a different opinion of what the law was.

It is of interest to note that Attorney Joe Negron, an associate of Karen Steger's firm had observed Roche waiting for Ms. Steger in the firm's waiting room. Mr. Negron recalled that he had a brief conversation with Roche prior to the Roche/Steger conversation mentioned previously. During this conversation, Roche told him that the judge had ruled to terminate the parental rights of the mother in the Puffinberger case. Mr. Negron also advised that statements made by Roche during this conversation indicated to him that he (Roche) was obviously familiar with the details and basis of the ruling in question at that time.

Prior to appearing at Ms. Steger's office, Mr. Roche telephoned Attorney Smith's office at 5:13 P.M. and spoke with the receptionist, Karen Martin. When interviewed, Ms. Martin stated that Roche had called, asking for Mr. Smith. Attorney Smith advised Ms. Martin that he did not wish to speak with Roche but to take a message. Roche then told the receptionist if Mr. Smith wanted to know the ruling of the court in the Puffinberger case, he had it. Ms. Martin did not believe that Roche physically had the Order at the time of the call but rather, simply was aware of the decision of Judge Kanarek.

It appears that Tim Roche had at least knowledge of the contents of the Court Order when he called Attorney Smith at 5:13 P.M., May 29, 1990. It would then follow that, if the sworn statements obtained are to be believed, Roche obtained a hard copy of the Puffinberger Court Order sometime between 5:13 P.M. when he called Attorney Smith's office or approximately 6:45 P.M. when he left Attorney Steger's office and 8:30 P.M. when he telephoned Ms. Steger at home. For informational purposes, the Martin County Clerk's Offices close at 5:00 P.M.; HRS offices in Stuart and West Palm Beach at 5:30 P.M.

A related issue regarding this case arose during the interview of Ms. Carol Tilton, Supervisor of the Juvenile Division, Martin County Clerk's Office on June 15, 1990. Under oath, Ms. Tilton stated that only three (3) copies plus the original existed and that she had not made additional copies for anyone. After an interview of a coworker, Tammy Franklin, it was shown that Ms. Tilton had not been truthful during her sworn statement and had, in fact, shown the Court Order to a number of courthouse employees as well as Xeroxing a copy for Ms. Franklin. According to Ms. Franklin, the copy given remained in her possession throughout the day, was brought home the evening of May 29th, left in her auto at her residence in Indidantown and returned to Ms. Tilton on the following

morning. Ms. Franklin stated that she had glanced at the Order on May 29th and only read it completely the following day when she returned to the office. She also denies any contact with reporter Roche.

During the subject investigation, the following individuals were contacted and interviewed:

HRS PERSONNEL (STUART OFFICE)

Patricia Santiago (Attorney)
Betty Segebarth (Adoptions)
Jane Vernon (Secretary)
Robin Kloser (Foster Care)
Lila Daniels (Caseworker)
Greg Daniel (Investigator)

HRS PERSONNEL (WEST PALM BEACH)

Laurel Hopper (District Legal Counsel)
Janice Gammill (Senior Attorney)
Cam Freedlund (Public Information Coordinator)
Catherine Thomas (Secretary)

CLERK'S OFFICE (MARTIN COUNTY)

Carol Tilton (Supervisor/Clerk-Juvenile Division)
Tammy Franklin (Clerk-Appeals Division)
Julie Ann Rodenberry-Sherman (Supervisor Circuit Court)
Brenda Chapman (Deputy Clerk-Felony Division)

GUARDIAN AD LITEM PROGRAM

Debbie Fromang

ATTORNEYS (PRIVATE PRACTICE)

Ron Smith (Attorney for mother)
Karen Steger (Guardian Ad Litem)
Joe Negron (Associate, Steger & Steger)

OTHER

Lynn Rusin (Secretary for Attorney Smith)
Kathy Diggins (Foster care mother)
Barbara Hopkins, Legal Assistant, Steger & Steger
Leslie Cuartas, Paralegal, Steger & Steger

During this investigation, an attempt was made to obtain copies of the Fax machine log from HRS, both Stuart and West Palm Beach offices, with negative results. HRS's present policy does not include the maintaining of any type of transmission log. This was done to possibly show that the Court Order had been Faxed to Tim Roche at the Stuart News on May 29th. A request had been made to Southern Bell for toll information on both the business telephone number and the telephone (Fax) number at the West Palm Beach HRS office in a further attempt to ascertain if the copy came from that office. Results obtained under subpoena failed to show any such transmission or call. In the event the Stuart HRS Fax machine had been used for that purpose there would be no telephone toll record since it would have been a local transmission (call).

All persons directly related to the Puffinberger Court Order have also been offered a voluntary polygraph examination. All HRS personnel have declined to be examined as well as Ms. Tammy Franklin of the Clerk's Office. The remainder of the Clerk's Office employees have responded affirmatively as well as Attorneys Ron Smith and Karen Steger and Mr. Smith's secretary, Lynn Rusin. Tim Roche was contacted and asked to give a statement to this office as to how he had obtained the subject Court Order which he declined to do, upon advice of attorney.

It is this investigator's determination that all investigative avenues, other than possible polygraph examinations have been exhausted. The investigative results will be referred to CASA Dave Phoebus for his review and determination.

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: July 19, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 1:05 P.M. this date, the undersigned spoke via telephone to Ms. Karen Martin, receptionist for Attorney Ron Smith. This contact was made to determine the time and content of the telephone call from reporter Tim Roche on May 29th.

Ms. Martin stated that she received the call from Roche at exactly 5:13 P.M. and had referred to her message pad for the time and date. With regard to the statements made by Roche, she advised that he had asked for Ron Smith and then told her that if Ron wanted to know the ruling, he had it. She also stated that she did not believe he physically had the Order at that time, but rather knew the decision of Judge Kanarek.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: July 20, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 9:00 A.M. this date, the undersigned spoke with Mr. Chuck Piver, Inspections Division of HRS, regarding the subject case.

After briefing Mr. Piver on the status of the case, he was requested to obtain, if available, Suncom telephone bills for the HRS office in West Palm Beach (both regular telephone service and Fax machine) for May 29, 1990. He indicated he would obtain this info as expeditiously as possible and contact this office with the results.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: July 24, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 3:45 P.M. this date, the undersigned contacted Mr. Robert Williams, District Manager of HRS, West Palm Beach, 837-5078. This was done in a further attempt to ascertain if the personnel of the HRS Stuart office would be willing to voluntarily submit to polygraph examinations regarding the subject case. It should be noted that a letter had been sent on July 10, 1990 requesting a determination from Mr. Williams. No reply was forthcoming.

Mr. Williams at this time indicated that it was the HRS policy not to have employees of his agency submit to polygraph examinations. He stated he would confirm this conversation with a letter indicating the above.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin	DATE: July 26, 1990
CASE TITLE: MARTIN COUNTY CIRCUIT COURT	CASE #: M90/06010ISC
CASE TYPE: Allegation of Criminal Contempt	REPORT BY: _____ CSAI David P. Powers/sme
COPIES TO:	APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At approximately 2:30 P.M., July 25, 1990, the undersigned telephonically communicated with Ms. Jill Taylor, reporter with the Palm Beach Post, Stuart office, regarding her knowledge of the Puffinberger issue. It appears through interviews conducted that Ms. Taylor might have obtained the contents (but not the hard copy) of the Puffinberger Court Order on May 29th.

When questioned, Ms. Taylor declined to discuss the issue of whether she had, in fact, obtained any information from any source on the date in question.

INVESTIGATION CONTINUING

OFFICE OF THE
STATE ATTORNEY

Nineteenth Judicial Circuit of Florida
Serving
Indian River, Martin, Okeechobee
and St. Lucie Counties

BRUCE H. COLTON
State Attorney

INVESTIGATIVE REPORT

CO. OF ORIGIN: Martin — DATE: August 1, 1990

CASE TITLE: MARTIN COUNTY CIRCUIT COURT — CASE #: M90/06010ISC

CASE TYPE: Allegation of Criminal Contempt — REPORT BY: _____ CSAI David P. Powers/sme

COPIES TO: — APPROVED: /s/ DPPowers Chief Investigator

SYNOPSIS: At 10:00 A.M. this date, this investigator received a telephone call from Ms. Catherine Thomas, secretary as HRS. She indicated that all involved personnel at the Stuart office had been personally contacted and all declined to be polygraphed.

Mr. Williams, the District Supervisor - HRS, had previously spoken with this investigator and had advised the same. He stated, at that time, that he would follow up with a letter as to the declination but as of this date, no letter has been received.

INVESTIGATION CONTINUING

OFFICE OF THE
State Attorney

NINETEENTH JUDICIAL CIRCUIT OF FLORIDA
SERVING
INDIAN RIVER, MARTIN, OKEECHOBEE
AND ST. LUCIE COUNTIES

Bruce H. Colton
State Attorney

411 South Second Street
Fort Pierce, Florida 34950
(407) 465-3000

June 22, 1990

Mr. Robert Williams
District Administrator - HRS
111 George Avenue
West Palm Beach, FL 33402

Dear Mr. Williams:

As per our telephone conversation this date, this is to confirm this agency's intention to request polygraph examinations of a number of employees of your agency. As I had indicated, this is in response to a directive by Circuit Court Judge Paul Kanarek that this office investigate the circumstances surrounding the improper release on May 29, 1990 of a sealed Court Order involving a juvenile, CHARLOTTE M. PUFFINBERGER, to a newspaper reporter. The information contained in this Court Order was then quoted in a local newspaper.

The individuals concerned would be the following employees: JANICE GAMMILL, KATHERINE THOMPSON, LAUREL HOPPER, PATRICIA SANTIAGO and CAM FREEDLUND. Please be aware that these polygraph examinations would be entirely voluntary and we would make every effort to accommodate the work demands of your employees so as not to interfere with their normal work day.

I will be out of town next week but would anticipate contacting you Friday, May 29th, in order to set up these tests.

Sincerely,

/s/ David P. Powers
David P. Powers
Chief Investigator

DPP: sme

HRS STATE OF FLORIDA

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

June 28, 1990

David P. Powers
Chief Investigator
Office of the State Attorney
Nineteenth Judicial Circuit
411 S. Second Street
Fort Pierce, FL 34950

Dear Mr. Powers:

I am writing in response to your letter of June 22, 1990.

The referenced employees do not wish to volunteer for polygraph examinations.

It should be noted that Laurel E. Hopper, District Legal Counsel; Katherine Thomas, Paralegal Specialist; and Cam Freedlund, Public Information Officer, have not yet been questioned by you concerning knowledge they may have pertinent to your investigation.

Perhaps you would like to contact them regarding the information you are seeking.

Yours truly,

/s/ Robert L. Williams
ROBERT L. WILLIAMS
District IX Administrator

REW/LEH/kt
cc.: Laurel E. Hopper
Katherine Thomas
Cam Freedlund

HRS STATE OF FLORIDA

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

August 6, 1990

David P. Powers
Chief Investigator
Office of the State Attorney
Nineteenth Judicial Circuit
411 S. Second Street
Fort Pierce, FL 34950

Re: Puffinberger

Dear Mr. Powers:

I am writing to confirm our telephone conversation last week and in response to your letter of July 10, 1990.

The referenced employees in the Stuart office do not wish to volunteer for polygraph examinations in connection with the above matter.

Ms. Hopper was also gratified to hear that as a result of your investigation you had "excellent" reason to believe that the information was not transmitted from the West Palm Beach office.

If you are in need of further assistance, please do not hesitate to call the office.

Yours truly,

/s/ Katherine Thomas
Katherine Thomas
Paralegal Specialist

CASE JOURNAL

DEFENDANT_____ CASE NUMBER:_____

DATE	TIME	ACTIVITY
8/28/90	12:00 Noon	Spoke w/ Judge Kan. He requested that Tim Roche be subp to give a statement and upon Tim Roche's refusal—apply for an Order to Show Cause.
8/28/90	1:15 pm	Spoke w/ Chief Inv. Powers—He will serve subp on Roche on 8/29/90.
8/30/90		Subp on Roach served by Chef Inv Powers.
8/30/90	3:10 pm	Ann Noble—Atty for Stuart News called in a huffy manner advising she would move to quash subp.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA

IN RE: INVESTIGATION: FLORIDA STATUTE 27.04, SUBPOENA OF TIM ROCHE

STATE OF FLORIDA)
)ss.
COUNTY OF MARTIN)

AFFIDAVIT

BEFORE ME this day personally appeared David P. Powers who, being first duly sworn, deposes and states as follows:

1. My name is David P. Powers and I am employed as the Chief Investigator for the State Attorney's Office for the 19th Judicial Circuit.

2. In my course of duties as an investigator, I have been assigned to investigate the release of a confidential order issued by Judge Paul B. Kanarek on May 29th, 1990.

The confidential order was limited in its release to specific parties involved in a hearing in the termination of parental rights of one Cheryl Puffinberger, and specifically not made a part of public records or released to the press.

3. On May 30th, 1990, The Stuart News published an article written by reporter Tim Roche, quoting the confidential order of Judge Kanarek.

4. My investigation has been directed toward finding the source of the "leaking" of the confidential order to Tim Roche of The Stuart News.

5. On August 30th, 1990, I personally served Tim Roche with an investigative subpoena issued by the Clerk of Court pursuant to Florida Statute 27.04.

The subpoena commanded Mr. Roche to appear before the State Attorney on September 7th, 1990 at 10:00 A.M.

6. On September 7th, 1990, Tim Roche did appear before Assistant State Attorney Richard A. Barlow.

Mr. Roche refused to answer any and all questions relating to the source of Mr. Roche's receipt on the confidential order.

7. All other sources and investigation leads have been exhausted in an attempt to determine who provided Mr. Roche with the confidential order of Judge Kanarek.

8. In order to complete the investigation it is necessary for Mr. Roche to answer questions concerning the source of his receipt of the confidential order.

This affidavit is made in good faith.

Further, affiant sayeth naught.

/s/ David P. Powers
DAVID P. POWERS

Sworn to and subscribed before me
this 7th day of September, 1990.

/s/ Mucci
NOTARY PUBLIC
STATE OF FLORIDA

Notary Public, State of Florida
My Commission Expires Dec. 11, 1993
Bonded Thru Troy Fain-Insurance Inc.

June 12, 1990— Case opened.

June 14, 1990— Conference with CASA Dave Phoebus.

June 15, 1990— Interview of Tilton, Tammy Franklin, Julie Ann Roddenberry-Sherman, Brenda Chapman, Janice Gammil and Lynn Rusin.

June 18, 1990— Interview of Karen Steger.

June 18, 1990— Interview of Ron Smith.

June 18, 1990— Attempted to interview Tim Roche (reference to Nancy Smith—Managing Editor—Stuart News).

June 19, 1990— Spoke with Katherine Thomas/HRS-West Palm Beach in reference to fax—no logs.

June 19, 1990— Interview of Debbie Fromang.

June 22, 1990— Received call from Attorney Ann Noble/ Rep. Scripps Howard.

June 22, 1990— Interview of Patricia Santiago.

June 22, 1990— Letter to Robert Williams/HRS.

June 28, 1990— Reply from Robert Williams/negative.

July 2, 1990— Interview of Greg Daniel, Lila Daniels, Robin Kloser, Betty Segebearth, Jane Vernon/HRS Stuart.

July 5, 1990— Interview of Cam Freedlund, Laurel Hopper, Catherine Thomas—HRS/West Palm Beach.

July 9, 1990— Interview of Patricia Santiago.

July 9, 1990— Jane Vernon checked fax—no record— Stuart Office/HRS.

July 10, 1990— Letter to Robert Williams, in reference to Stuart Office HRS/polygraphs.

July 12, 1990— Called Marsha Stiller—Set up polygraph for Tilton, Sherman, Franklin and Chapman.

July 12, 1990— Statement of Attorney Negron. (Conversation with Roche).

July 12, 1990— Called Stiller—Tammy Franklin (only) declined polygraph. Tilton, Chapman and Sherman/OK.

July 12, 1990— Attorney Smith—yes to polygraph.
Attorney Steger—yes to polygraph.
Lynn Rusik—yes to polygraph.

July 19, 1990— Interview of Kathy Diggins.

July 19, 1990— Spoke (telephone) to Ron Smith's receptionist in reference to Roche calling at 5:13 p.m.—"If he wanted to know the ruling, he had it—NOT A COPY."

July 20, 1990— Called Chuck Piver—Inspector Div.—HRS in reference to fax/suncom in WPB—negative.

July 23, 1990— Interview of Leslie Cuartass (Steger). Interview of Barb Hopkins

July 24, 1990— Called Williams/polygraph on Stuart HRS—negative.

July 25, 1990— Called Jill Taylor/Palm Beach Post.

August 30, 1990—Served Tim Roche with subpoena.

September 7, 1990—Appeared at SAO.

*Telephone tolls for HRS (both offices) were obtained under subpoena—negative.

TOTAL NUMBER OF INTERVIEWS = 22

HRS (WPB)	= 4
HRS (STUART)	= 6
CLERK (MC)	= 4

GUARD AD LITEM = 1
ATTORNEYS (PRIV) = 3
OTHER = 4

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

Case No. 92-373

In The
Supreme Court of the United States
October Term, 1992

TIM ROCHE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

ROBERT A. BUTTERWORTH
Attorney General

SARAH B. MAYER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
Palm Beach County Regional
Service Ctr.
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(407) 837-5062

COUNSEL FOR RESPONDENT

---

10 2 PM

QUESTION PRESENTED

(Restated)

Whether The First And Fourteenth Amendments To The United States Constitution Prohibit The State Of Florida From Compelling A Journalist To Reveal The Identity Of A Source Who Disclosed A Confidential Court Order.

TABLE OF CONTENTS

Page(s)

Question Presented i

Table of Contents ii

Table of Authorities iii

Constutional Provisions Involved 1

Statement of the Case 2

A. Statement Of Facts And Procedural History 3

B. How The Federal Question Was Presented 6

Reasons For Denying The Writ 7

A. Petitioner's Assertion That He Is Being Punished For Publication of Information Obtained Was Neither Raised Nor Decided Below 8

B. This Court's Recent Decision In *Florida Star* Is Distinguishable From The Circumstances Of This Case 10

C. Fundamental Constitutional Interests Are Not Seriously Threatened When A State Prosecutes A Reporter For His Refusal To Disclose His Source After Applying This Court's Balancing Test As Enunciated In *Branzburg* 14

Conclusion 15

TABLE OF AUTHORITIES

Cases — *Page(s)*

Bankers Life and Casualty Company v. Crenshaw, 486 U.S. 71 (1988) 8

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 8

Branzburg v. Hayes, 408 U.S. 665 (1972) . . 5, 7, 11, 15

Cape Publications, Inc. v. Hitchner 549 So.2d 1374 (Fla. 1989) 13

Cardinale v. Louisiana, 394 U.S. 437 (1969) . 7, 8, 9, 10

CBS, Inc. v. Cobb, 536 So.2d 1067 (Fla. 2nd DCA 1988), ... 7, 11

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) . . . 14

Globe Newspaper Co. v. Superior Court, 451 U.S. 596 (1982) 14

In re Investigation: Florida Statute 27.04, Subpoena of Roche, 589 So.2d 978 (Fla. 4th DCA 1991), *review denied*, 599 So.2d 1279 (Fla. 1992) 1, 3

Maryland v. Craig, 497 U.S. ____, 110 S.Ct. ____ 111 L.Ed.2d 666 (1990) 13

Miami Herald Publishing Co. v. Morejon, 561 So.2d 577 (Fla. 1990) 5, 7, 11

New York v. Ferber, 458 US 747 (1982) 13

Osborne v. Ohio, 495 U.S. 103 (1990) 13

Prince v. Massachussetts, 321 U.S. 158 (1944) 14

The Florida Star v. B.J.F., 491 U.S. 524 (1989) 10

Cases *Page(s)*

Webb v. Webb, 451 U.S. 4923 (1981) 8

Sec. 39.467 Fla. Stat. (1990) 2, 3

Sec. 39.471 Fla. Stat. (1990) 2, 3

Sec. 119.07 Fla. Stat. (1991) 9

Sec. 119.07(8) Fla. Stat. (1991) 9

Case No. 92-373

In The

Supreme Court of the United States

TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA,

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Respondent, the State of Florida, respectfully prays that this Court decline to issue a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Fourth District, in the case captioned *In re Investigation: Florida Statute 27.04, Subpoena of Roche,* 589 So.2d 978 (Fla. 4th DCA 1991), *review denied,* 599 So.2d 1279 (Fla. 1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioner, the following Florida Statutes are involved: Florida Statute § 39.467 (1990):

* * *

> (6) All hearings involving termination of parental rights shall remain confidential and closed to the public. Hearings involving more than one child may be held simultaneously when the children involved are related to each other or were involved in the same case. The child and the parents or legal custodians may be examined separately and apart from each other.

Florida Statute § 39.471 (1990):

> (3) The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the court may deem proper, and may punish by contempt proceedings any violation of those conditions.

STATEMENT OF THE CASE

A. Statement of Facts and Procedural History

Respondent can not accept Petitioner's statement of the case and procedural history as they are argumentative, include facts not included in the opinion below, and matters not relevant to the threshold jurisdictional question. The facts, as found by the Fourth District in *In re Investigation: Florida Statute 27.04, Subpoena of Tim Roche,* 589 So.2d 978 (Fla. 4th DCA 1991), *review denied,* 599 So.2d 1279 (Fla. 1992), and as supported by the trial court record (PA 3-9),[1] are that the trial court entered an order terminating a mother's parental rights. Pursuant to F.S. § 39.411 and F.S. § 39.467, said order was not open for public inspection; however, on the day after the order was issued, a story appeared in The Stuart News, written by Petitioner, which disclosed the contents of the termination order. In the course of Respondent's investigation of the violation of the statutory proscription against disclosure of such confidential juvenile orders, a subpoena was issued to Petitioner in an effort to determine who provided Petitioner with a copy of the confidential order. Petitioner moved to quash the subpoena and for a protective order, asserting that he was privileged not to disclose his source. (A 1-3). The trial court conducted a hearing, at which Petitioner stipulated that the information sought was relevant to the issues in the case, and that no alternative source existed for the information (A 9-10, 19). He asserted, however, that there was no compelling interest in requiring him to disclose his source because the privacy interests of the child no longer existed due to the massive publicity already surrounding the case

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1 References to Respondent's Appendix are designated to "(A)"; references to Petitioner's Appendix are designated "(PA)". References to the record are designated as "(R)".

The trial court disagreed and required Petitioner to disclose the identity of the person who had provided him with a copy of the confidential order within 10 days. The order further provided that if Petitioner failed to comply with the order, he would be adjudicated guilty of indirect criminal contempt and sentenced to 30 days in Martin County Jail. Petitioner could purge the contempt at any time by complying with the trial court's order (PA 10-15). When Petitioner did not comply within 10 days, Respondent filed its affidavit of noncompliance. Petitioner was adjudicated guilty of indirect criminal contempt and appealed said ruling to the appellate court.

In the Fourth District Court of Appeal, the issued raised by Petitioner was whether the State had demonstrated a compelling interest sufficient to outweigh his qualified privilege not to disclose a confidential source afforded a newspaper reporter under the First Amendment and the Florida Constitution (A 29-42). Specifically, the issue addressed by the appellate court was:

> This case involves a consideration of the tension between the constitutional right of the public to unencumbered access to information from anonymous sources and the generalized governmental interests in protecting the secrecy of juvenile proceedings from public scrutiny. More particularly, the case focuses upon a determination of the priority of societal interests in requiring certain proceedings to remain confidential as opposed to a reporter's privilege against coerced disclosure of confidential sources.

(PA 3).

In its Answer Brief, Respondent argued that it had demonstrated such a compelling interest (A 43-56), and in his reply brief, Petitioner argued that Respondent had not done so (A 57-65). The Fourth District Court of Appeal held that

the State's interest in protecting and preserving the privacy rights of parties to, and particularly of children involved in, a termination of parental rights proceeding outweighed Petitioner's qualified privilege not to disclose his source (PA 3-9).

This result occurred after the District Court observed that "the parties agree that sections 39.411 and 39.467, Florida Statutes (1989), require that proceedings terminating parental rights are protected and not subject to public scrutiny. Furthermore, they acknowledge that under the auspices of the first amendment to both federal and state constitutions a reporter has a qualified privilege not to disclose his sources of information." (PA 5). The court further opined that in reviewing the standard set forth in *Branzburg v. Hayes,* 408 U.S. 665 (1972), and acknowledged in *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577 (Fla. 1990), "the parties agree further that requirements one and two of the balancing test were met in the trial court presentation; issue was joined there and here in regard to requirement three. Roche contends that, under the facts of this case, there is no compelling interest in requiring him to divulge his sources because the privacy interests of this child have long since been blown, so to speak, by the earlier persuasive publicity surrounding the case and its background." (PA 8).

Petitioner requested the appellate court to certify to the Florida Supreme Court, as a question of great public importance, whether the State's interest in maintaining the confidentiality of juvenile proceedings was sufficiently compelling to outweigh his qualified privilege to refuse to disclose his confidential sources. (A 66-70). Respondent opposed, and the Fourth District Court of Appeal denied the motion and issued its mandate on January 14, 1992. (A 71).

On January 27, 1992, Petitioner filed notice that he intended to invoke the discretionary jurisdiction of the Florida

Supreme Court. In his brief on jurisdiction, Petitioner argued that the decision of the appellate court conflicted with settled law of the State of Florida, that the decision expressly and incorrectly construed provisions of the Federal and Florida Constitutions, and that there was no reason in this case for departing from settled law regarding journalists' qualified privilege (A 72-80). The State filed its brief disagreeing with Petitioner's arguments, and on June 2, 1992, the Florida Supreme Court declined to accept conflict jurisdiction of this case (PA 1).

B. How the Federal Question was Presented

The issue which was squarely presented, litigated and decided, was whether the State's interest in maintaining the confidentiality of termination of parental rights proceedings is sufficiently compelling to outweigh a reporter's qualified privilege to refuse to disclose his confidential source (A 1-5, 9-10, 19, 29-42, 43, 56, 57-65, PA 3-9, 10-14). Petitioner has never prior to seeking this Court's certiorari review of the state court's decision, asserted that he is being punished for publication of the confidential court order. While it is true that a *portion* of Respondent's argument in the trial court was that the publication of a confidential court order was improper, the trial court's order was not based on this argument, rather that order addressed the issue of whether Petitioner enjoyed a qualified privilege not to disclose his source (PA 10-14). Further, Respondent did not reassert such an argument in the Fourth District (A 43-56), and therefore the decision of the Fourth District does not address this issue (PA 3-9). Finally, even in seeking review in the Florida Supreme Court, Petitioner did not assert or argue that he was in effect being punished for publication; rather he requested the Court determine whether Respondent's interest in maintaining the confidentiality of termination of

parental rights proceedings outweighed his privilege of non-disclosure (A 72-80). Petitioner has failed to meet the minimum requirements mandated under *Cardinale v. Louisiana,* 394 U.S. 437 (1969), that unless it appears on the record that a federal question was both raised and decided in the state courts below, appellate jurisdiction in the United States Supreme Court fails.

REASON FOR DENYING THE WRIT

The First and Fourteenth Amendments to the United States Constitution Do Not Prohibit the State of Florida from Compelling A Journalist to Reveal the Identity of A Source Who Disclosed A Confidential Court Order.

The question answered by Florida's Fourth District Court of Appeal was whether the government in its efforts to police its employees and court officers for derelictions of their duties, may require a news reporter to reveal the source of a confidential court order.

Indeed the answer to the question does not "require fresh furrows in the First Amendment landscape." (See Petitioner's Petition for Writ of Certiorari at page 20). The question was correctly answered below based on the principles enunciated by this Court's decision in *Branzburg v. Hayes,* 408 U.S. 665 (1972), and decisions of the state courts' addressing the issue, *CBS, Inc. v. Cobb,* 536 So.2d 1067 (Fla. 2nd DCA 1988), and *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577 (Fla. 1990). As such all requested relief should be denied.

A. Petitioner's Assertion That He Is Being Punished For Publication Of Information Obtained Was Neither Raised Nor Decided Below

Respondent submits that as the record and decisions below clearly reveal that the issue suggested by Petitioner, i.e., that he is being punished for publication, was neither raised, nor decided below, therefore that issue may not be raised or decided by this Court. *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988); *Board of Directors of Rotary International v. Rotary Club,* 481 U.S. 537 (1987); *Webb v. Webb,* 451 U.S. 492 (1981); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

In a nonpersuasive attempt to overcome his jurisdictional difficulties, Petitioner asserts in his statement of how the federal question was presented that: "Though seemingly litigated as a question of a news reporter's qualified privilege not to reveal the identity of a confidential source, this case was in fact adjudicated as a question of a reporter's right to publish lawfully obtained official information about a matter of widespread community concern." (See Petitioner's Petition at 15). Nothing decided below supports Petitioner's assertion.

Petitioner further attempts to modify the factual record below by acknowledging that he "did not challenge the State's representations", (1) that there was no dispute that Petitioner possessed relevant information, or (2) that the State maintained that it had exhausted all alternative ways of determining who had leaked the Termination Order to him. (See Petitioner's Petition at 16-17). In fact, Petitioner specifically states, "both Petitioner and the State focused their arguments at the trial and appellate levels on the third prong of Florida's qualified privilege law. See R 80-85, 104." (Petitioner's Petition at 16-17).

Petitioner does not challenge whether he had in his possession relevant information. Rather, he now attempts to excuse his stipulation below, that the State "exhausted all alternative ways of determining" the leak by asserting that he relied upon Respondent's investigator's affidavit and testimony, which Petitioner asserts are inaccurate. Petitioner implies that he could not have discovered that the investigation had been incomplete until 1992, when Respondent's investigation was allegedly no longer "active" because, pursuant to F.S. § 119.07 (1991), Respondent's investigation records were exempt from disclosure. However, Petitioner offers no explanation as to why he never attempted to depose the investigator or obtain these records. Petitioner's contentions are particularly specious in light of F.S. § 119.07(8) (1991), which expressly provides that:

> (8) The provisions of this section are not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution.

Moreover, raising a "factual" change at this point comes too late. (See Petitioner's Petition at 16, footnote 11). Contrary to the representations, Petitioner could have challenged the thoroughness of Respondent's investigation but elected *not* to do so. Petitioner cannot now argue that the decision below was incorrect based upon his own stipulations as to the facts and issues that were to be resolved below. As noted in *Cardinale,* 394 U.S. at 439, "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider applicability of state statutes in light of constitutional challenge, since the statute may be construed in a way which saves their constitutionality...." In *Cardinale,* the court dismissed for

want of jurisdiction where the defendant's confession was introduced in its entirety in a subsequent trial pursuant to a Louisiana statute. Cardinale objected solely to the admission of those parts of his confession which he argued were both irrelevant and prejudicial in his trial. The court observed, "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below." *Cardinale,* 394 U.S. at 438.

The lower courts were *not* confused by Respondent's representations below, rather the courts addressed the issues *as framed and presented by Petitioner.* Nowhere in the decision of the Fourth District Court of Appeal is there any language which can be interpreted as holding that Petitioner is being punished for publication of the confidential order.

B. This Court's Recent Decision In *Florida Star* Is Distinguishable From The Circumstances Of This Case

In *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989), this Court stated:

> We do not hold that truthful publication is automatically constitutionally protected, or that, there is no zone of personal privacy within which the state may protect the individual from intrusion by the press....We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order...

Id. at 541.

Contrary to Petitioner's contentions, *no* liability (neither damages or punishment) is being placed on him for his truthful publication no matter *how* he obtained the "leaked order". Rather, in conformance with this Court's decision in *Branzburg, supra,* recognized in *Miami Herald Publishing Co. v. Morejon, supra,* and *CBS, Inc. v. Cobb, supra,* the state courts balanced Petitioner's First Amendment rights against his obligation as a citizen to give testimony. Finding that the State's interest in protecting the confidentiality of its termination of parental rights proceedings to be sufficiently compelling to outweigh Petitioner's First Amendment rights, the trial court ordered Petitioner to testify to disclose his source. Clearly, Petitioner is *not* being punished for the publication of this information, rather he is being sanctioned for his willful refusal to comply with the court's order.[2]

Certainly, when sensitive information rests in the government's hands, the government has the responsibility of protecting its confidentiality. Here, it is undisputed that the trial judge who entered the order in question took extraordinary steps to ensure his order was not disclosed to the

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2 Petitioner argues that the true issue at stake was not the State's interest in protecting the privacy rights of participants in termination of parental rights proceedings, but merely a general intent in the orderly administration of justice, asserting that F.S. § 39.411 and § 39.467 are mere records-keeping statutes. However, nearly identical provisions of Florida's Statutes have survived constitutional challenge and have expressly been recognized as having been enacted to protect parties to adoption, child dependency, and here, termination of parental rights proceedings from harmful publicity. *In re Adoption of H.Y.T.,* 458 So.2d 1127 (Fla. 1984); *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988). Clearly the statute in question is not a mere records-keeping statute, but is in fact a statute enacted by Florida's Legislature to serve the compelling interest of privacy in family matters. As noted in the District Court's opinion the rights of minors herein to confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's disclosure..."such action on his part was not qualifiedly privileged." 589 So.2d at 978.

public. He did not enter another order sealing the termination order, as the proceedings and files were closed to the public by statute. Copies of the order were reviewed by various employees of the clerk's office and HRS employees. There was no evidence however, that any of these employees violated the statutory proscription by allowing the public to view the order. While it is not known whether the contents of the order were discussed by anyone who viewed it, there is no evidence that it was. Moreover, there is no record evidence dispositive of this issue because the thoroughness of Respondent's investigation below was not a contested issue; rather Petitioner stipulated that Respondent had exhausted all alternative sources for the information as to who had disclosed the order to him.[3]

Respondent is not attempting to punish publication of the confidential information unevenly or unfairly. Respondent is seeking the identity of Petitioner's source in order to prosecute those persons and/or rectify those procedures which unlawfully permitted disclosure of the confidential order to Petitioner. Petitioner, in failing to comply with the trial court's order to disclose *how he secured* the confidential information, is, like any other citizen, being sanctioned for his conduct in refusing to obey the lower court's order.

Lastly, Petitioner suggests that the statute in question, which prohibits disclosure of confidential information by all who have access to it, does not really protect any privacy rights because the statute allows disclosure of the information to the child, his parents and their attorneys. Of course the parties to and subjects of the litigation (and their counsel)[4] are entitled

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3 Additionally, because Petitioner agreed to the facts below, he can not legitimately ask this Court to assume that the government failed in its duty to maintain the confidentiality of these documents.

4 Obviously the attorneys are bound by their ethical obligations not to disclose this information, and are equally subject to sanctions for violation of this ethical duty.

to access to this information. Simply because the *parties* to this type of action have access to this information does not mean that anyone else is entitled to disclose this information, or that the litigants' privacy rights are not protected by the statute. While it is true that one whose confidential records have been published does not have a cause of action against a newspaper who prints them, that person *does* have a cause of action against the person who *discloses* them. *Cape Publications, Inc. v. Hitchner* 549 So.2d 1374 (Fla. 1989).

More importantly, the rights of children have *always* been of primary concern to the courts of this country. In *New York v. Ferber,* 458 US 747 (1982) this Court held:

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." [citations omitted]. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." [citations omitted]. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

Ferber at 756-757. See also: *Maryland v. Craig,* 497 U.S. ____, 110 S.Ct. ____ 111 L.Ed.2d 666 (1990), (State's interest in protecting the physical and psychological well-being of child abuse victims sufficiently important to outweigh a defendant's right to face his accusers in court); *Osborne v. Ohio,* 495 U.S. 103 (1990), (State's compelling interest in protecting the physical and psychological well-being of minors sufficient to outweigh a defendant's First Amendment

rights); *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), (Government's interest in the well-being of its youth justified restrictions on broadcast of materials protected by the First Amendment); *Prince v. Massachussetts,* 321 U.S. 158 (1944), (where the State's interest in protecting welfare of children sufficient to outweigh parent's religious beliefs); *Globe Newspaper Co. v. Superior Court,* 451 U.S. 596 (1982), (State's compelling interest in the physical and psychological well-being of minor victims of sex crimes sufficient to justify depriving the press and public of constitutional right to attend criminal trials). Since the courts and government stand *in loco parentis* with respect to the rights of children, the purpose of the statute here in question, clearly was of the highest order in protecting the child's privacy rights. Thus the trial court properly found that purpose outweighed Petitioner's privilege not to reveal his confidential source.

C. Fundamental Constitutional Interests Are Not Seriously Threatened When A State Prosecutes A Reporter For His Refusal To Disclose His Source After Applying This Court's Balancing Test As Enunciated In *Branzburg*

Petitioner again asserts that he is being sanctioned for his publication of truthful material. However, a review of the order holding him in contempt, the decision of the Fourth District Court of Appeal, and particularly the arguments contained in his own briefs in this cause, clearly reveal that this contention is simply untrue. The order, holding Petitioner in contempt, sanctions him for his refusal to identify the source of a confidential court order. The contempt order was entered after notice and hearing, and after consideration of the principles enunciated

by this Court in *Branzburg v. Hayes, supra.* As the decisions below conform with principles established by this Court, Respondent submits that the Petitioner has not demonstrated a basis upon which relief may be granted.

CONCLUSION

Wherefore, for the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Case No. 92-373

In The

Supreme Court of the United States

October Term, 1992

TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

APPENDIX

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TABLE OF CONTENTS

Roche's Motion to Quash . . . . . A 1-3

September 18 and November 2, 1990 Hearings . . A 4-28

Roches's Initial Brief on Appeal, in the Fourth District Court of Appeal . . . . . A 29-42

State's Answer Brief on Appeal, in the Fourth District Court of Appeal . . . . . A 43-56

Roche's Reply Brief on Appeal, in the Fourth District Court of Appeal . . . . . A 57-65

Roche's Motion for Certification to The Florida Supreme Court filed in the Fourth District Court of Appeal . . . . . A 66 -70

Mandate of the Fourth District Court of Appeal . . . A 71

Roche's Petition to Invoke Discretionary Review filed in The Florida Supreme Court . . . . . A 72-80

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN
AND FOR MARTIN COUNTY, FLORIDA

FELONY DIVISION

IN RE: INVESTIGATION: FLORIDA
STATUTE 27.04, SUBPOENA
OF TIM ROCHE.

TIM ROCHE'S MOTION TO QUASH SUBPOENA/MOTION FOR PROTECTIVE ORDER

TIM ROCHE, by and through his undersigned counsel, moves the court for an order quashing a subpoena served upon him by the office of the state attorney, and that the court otherwise enter an appropriate protective order, and as grounds therefor would show that:

1. TIM ROCHE is a reporter for the Stuart News.

2. The Office of the State Attorney, by and through Richard Barlow, Assistant State Attorney, has served upon TIM ROCHE a witness subpoena, commanding TIM ROCHE to appear before the state attorney on September 7, 1990, at 10:00 a.m.

3. This subpoena was served on August 7, 1990.

4. Though Assistant Attorney Richard Barlow has refused to disclose the subject of the "investigation" to which the subpoena is directed, TIM ROCHE believes that the investigation concerns an inquiry into the source of his news account of an order entered by Judge Kanarek terminating the parental rights of Cheryl Puffenburger, which story

appeared on page A1 of the May 30, 1990, edition of the Stuart News. A copy of that story is attached as Exhibit 9 to the Memorandum of Facts and Law contemporaneously submitted with this Motion.

5. Specifically, TIM ROCHE believes that the purpose of the subpoena is to force him to testify as to the identity of the member or members of the class of persons having access to the order which is the subject of the May 30 news story. That order was officially closed to public inspection pursuant to Florida Statute § 39.411.

6. TIM ROCHE enjoys a qualified privilege to withhold information concerning confidential sources for his news story.

7. Prior to compelling TIM ROCHE to reveal such information, the party seeking the testimony has the burden of clearly demonstrating that:

A. The reporter possesses information relevant to an investigation;

B. That the state has a compelling need for the information the reporter may have; and

C. That all alternative sources for the information have been exhausted.

8. The state cannot demonstrate any compelling interest that identification of ROCHE's source or sources would serve.

9. The State cannot demonstrate that the information it seeks is not available elsewhere.

10. Submitted contemporaneously with the filing of this Motion is a Memorandum of Facts and Law in support of this Motion to Quash/Motion for Protective Order. The contents of that Memorandum are hereby incorporated by reference.

WHEREFORE, TIM ROCHE respectfully requests the court to enter an order quashing the aforedescribed witness subpoena, and to enter an appropriate protective order, and that the court grant such additional relief as the court deems appropriate under the circumstances.

/s/

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IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN
AND FOR MARTIN COUNTY, FLORIDA
FELONY DIVISION
90-1290 CFA

IN RE: INVESTIGATION:
FLORIDA STATUTE 27.04
SUBPOENA OF TIM ROCHE.

HEARING OF SEPTEMBER 18, 1990 AND NOVEMBER 2, 1990

This case came before the court for hearing on September 18, 1990, before Honorable John G. Ferris, Circuit Judge, and November 2, 1990, before Honorable Robert R. Makemson, Circuit Judge, at the Martin County Courthouse, Stuart, Florida.

Appearances were as follows:

FOR THE STATE:

Richard Barlow
Assistant State Attorney
Stuart, Florida

FOR THE DEFENDANT:

Robert Lord, Jr.
Attorney for Defendant
Stuart, Florida

THE COURT: Alright, Tim Roche.

MR. LORD: Your Honor, my name is Rob Lord, I'm counsel for Mr. Roche.

THE COURT: Mr. Lord. I received this morning your memo so I have to (indiscernible) just skimmed it and have not had an opportunity to study it. I have not studied Mr. Barlow's although I flipped it, but I haven't had an opportunity to study it. Gentlemen, go ahead.

MR. BARLOW: Your Honor, we are here today on the order to show cause which was issued by Your Honor as to Mr. Roche—as to Mr. Roche as to why he should not be held in contempt of Court for failing to provide answers to the questions as to the source and identity of the person who provided Mr. Roche with a confidential order which had been issued by Judge Paul Kanarek on May 29, 1992.

The State, Your Honor, in this hearing seeks to compel Mr. Roche to provide the source and identity of the person who provided Mr. Roche with that confidential order which was written by Judge Kanarek and it was sealed in the Court's files and it was limited in its review and given to only certain parties in the case, the attorneys and HRS in the case and not allowed to be given to the press and to the public. And, Your Honor, that's what brings us to the Court today.

MR. LORD: Your Honor, as sort of a follow-up to that by way of procedural background. A subpoena was served on Mr. Roche to ask him to testify. We filed a motion to quash that subpoena and a motion for protective order. As a courtesy to the State Attorney's Office, however, we did appear before Mr. Barlow to permit him to prepare or to create a

record for the order to show cause so that we could dispose of this all at one time.

THE COURT: Uh-huh.

MR. LORD: And we believe procedurally what—this is sort of the chicken before the egg argument, but that the motion to quash should be heard first. What we do get into here is a Constitutional analysis and it involves the application of the three-pronged test. The State is prepared to present testimony regarding the third prong of that test, that prong is that they have exhausted all available other sources for the information that they are seeking. We are prepared to stipulate that they have done so for the purposes of this hearing in an attempt to short circuit maybe this three hour hearing and cut it down considerably. We have no evidence to submit in opposition on that point and we would ask the Court to concentrate on the second prong of the three-prong test and that's what our memorandum is directed primarily.

THE COURT: Uh, do you want to proceed on your motion to quash?

* * *

MR. LORD: Your Honor, if we could proceed with argument on motion to quash.

THE COURT: Alright.

MR. LORD: May it please the Court, Counsel. Your Honor, as we have seen the dispute underlying the subpoena in question, again in November of 1988 when a child was tragically beaten to death at the home of her mother and stepfather. HRS, according to this witness, first gained knowledge of child abuse in the home in June of 1988 and from June in '88 to the death of the child in November '88, there was a case worker assigned to the matter. The HRS

records, as indicated in the articles that have been submitted and are attached to our memorandum of law, suggest that H—the HRS case worker did not see the deceased child after September of 1988. In fact Mrs. Puffenburger, the mother, indicated that on—at no time did the case worker ever see the children. These facts received widespread publicity at the time of the death of the child. An example is contained in Exhibit 1 to our memorandum is an article entitled "HRS Supervisor Probably Won't be Disciplined". Another example is Exhibit 2, an article entitled "Child Abuse Death Spurs Frustation", a *Stuart News* article of June 4, 1989.

Your Honor, both parents were subsequently arrested on aggravated child abuse charges. The arrests received widespread publicity in all newspapers in this community, including the *Stuart News*. An example is Exhibit 4 to our memorandum.

Later the father is sentenced to a ten year jail term, the mother is sentenced to a nine month jail term. Both of those events incurred widespread publicity. There was an enormous amount of public interest and publicity arising out of these proceedings. Examples are also contained in Exhibits 5 and 6 to our memorandum.

Immediately after the death of her child, her half-sister becomes a ward of the State and HRS pursues a proceeding to terminate the parental rights of both parents. This proceeding received widespread publicity. As the witness indicated unlike other proceedings that have been closed for some reason HRS talked about it and the parents talked about it and the grandparents talked about this case.

Again, there was tremendous publicity—tremendous public interest and concern about the child, about HRS's handling of this matter, about the prosecution of the parents, about how this could happen.

Judge Kanarek's office reported receipt of approximately 45 letters. HRS reported receipt of approximately 50 letters inquiring as to the welfare of the child. The *Stuart News* attempted to keep the public informed. Over 40 articles were written in the *Stuart News alone* on this particular set of facts.

Four days before the hearing where the parental rights were terminated, the mother invites a reporter from the *Stuart News* and a reporter from the *Palm Beach Post* to speak with her about that hearing. That article from the *Stuart News* is attached to our memorandum. At that time she says that HRS is seeking to terminate her parental rights. That this is due to widespread community interest.

As previously indicated, the Court terminates the mother's parental rights, Mr. Roche authors an article published on May 30, 1990, disclosing the contents of the order and the State now wishes to compel Mr. Roche to reveal the source of the order.

Judge, that leads us to the Constitutional argument that we had in front of the Court. Reporters in Florida enjoy a qualified privilege not to disclose their confidential sources. There are two cases that we would cite for this proposition. *Tribune Company v. Huffstetler,* a Florida Supreme Court decision from 1986 at 489 So.2d 722. Also the case of *Morgan v. State,* a Florida Supreme Court decision from 1976.

The privilege is based upon protections of the First Amendment. The Florida Supreme Court in fact in 1990 has decided a case, *Miami Herald Publishing Company v. Morejon,* located at 561 So.2d 577 that indicates that that is the basis. But as it arises out of the *Branzburg* decision—

THE COURT: Well, *Morejon* is a little bit different.

MR. LORD: Oh it is.

THE COURT: There the—the reporter was an actual eyeball witness who attempted to evade being subpoenaed to testify as a witness.

MR. LORD: A very much different set of facts.

MR. LORD: The only reason why I cite that case to the Court is the Court comes out and says this is based—the privilege is based on the First Amendment.

THE COURT: Yes.

MR. LORD: And that language is in the case, but as the Court indicates, that case is clearly distinguishable.

THE COURT: Yes, but the Court went on to say in that particular instance, news media enjoy no greater protection than anyone else.

MR. LORD: Absolutely.

THE COURT: They are required to testify as anybody else in *Morejon*. They affirm the Third District in that case.

MR. LORD: Yes, Your Honor. That's the only time you're going to hear form me about that particular case.

THE COURT: Yeah, I know. It's not a very, uh—

MR. LORD: Your Honor, you will hear from me about *Huffstetler* and *Morgan* case.

THE COURT: I—I'm familiar with *Huffstetler* and *Morgan*.

MR. LORD: Okay. Well, there's a three-prong test that has been applied in Florida that says we have to do three things (indiscernible). We must establish that the reporter possesses information relevant to the investigation, we must demonstrate, most importantly, that the State has a compelling need for the information the reporter may have and

three, that all alternative sources for the information have been exhausted.

Well Judge, we're going to concentrate, if we can, on that second element. As we've indicated, we're stipulating that that third element has been satisfied. Clearly, the reporter has relevant information.

We would suggest, however, that the Court cannot establish the compelling need. The State's position as is outlined in its memorandum of law fails to focus on this particular case. They cite this all encompassing statute and say that by virtue of the statute and the statute alone and the need to protect the interest of children in general, that there is a privilege—that they can pierce this privilege. It's argued that this Court's primary concern should be that which is in the best interest of the child. We would agree that the Court should be concerned with the best interest of the child—of all children who are wards of the State. That's not the argument that we're making.

In both *Morgan v. State* and *Tribune Company v. Huffstetler,* the Florida Supreme Court quoted from Justice Powell's opinion in *Branzburg v. Hayes,* which is U.S. Supreme Court decision 408 U.S. 665. And I quote from *Huffstetler,* "Justice Powell made it clear that every such claim of privilege should be judged on its facts by the striking of the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

Your Honor, we could go through a long argument about what has happened in the past decade, I'm sure the Court is aware—everyone is aware, child abuse cases have come to forefront of our society. The press reports on them. The State has made quite an effort to punish the perpetrators of this awful crime and they have done that publicly.

The child abuse case in question here, as was indicated by the last witness, has been at the forefront of this community's attention for almost two years now. Since November of 1988 it is—well over 100 articles I would submit have been written in all the newspapers.

The Stuart area residents have been justifiably concerned about what happened here, what happens to the child, what happened to the parents, how HRS handled this matter and whether they did a good job.

More importantly Judge, the child's mother and father and grandparents have done nothing to shield from the public the decision making process regarding her custody. They have openly discussed it, they've argued their positions to the press, they haven't tried to protect the interests of the child. All these matters have received tremendous publicity.

Indeed Charlotte Mae's mother held a press conference just four days before the termination proceeding and discussed what HRS was trying to do. Through her public statements and the statements of her attorney, certainly the mother has waived any privacy right which she may have had.

The father through his voluntary public statements from calling the *Stuart News* and the *Palm Beach Post* from his prison cell, has waived any privacy right which he may have had.

So the State is back to the position—and they've taken the position they are protecting the child here. That it's necessary to protect this infant child. However, the actions of the parents in openly discussing the matter has destroyed that interest. Any damage to this child was done prior to the publication in question. All of the criminal prosecutions and the HRS proceedings and their discussions of the facts—open discussion of the fact that they perceive her as being unfit as a parent. I would respectfully disagree with the

testimony of the witness. That it would be worse to find that this order had been entered as opposed to the fact that your mother had been sentenced to jail for neglect and for allowing your half-sister to be beaten to death. I find that argument a difficult argument to believe. And that your father had been sentenced to ten years in prison for aggravated child abuse.

Whatever purpose enforcement of the sealed record statute might have in another case, and I will agree with the Court and with opposing counsel that there are circumstances when this statute would—would carry out it's purpose. But whatever purpose it might have in another instance, it had—does not carryout that purpose here. It serves no purpose in this case.

Your Honor, a factually similar case was decided, *The Tribune Company v. Huffstetler,* and the Court is familiar with that case. There—that was—

THE COURT: Mr. Lord, can I interrupt?

MR. LORD: Yes, Your Honor.

THE COURT: Cause you've struck on a point. You said whatever the Court decided has no application here. Now I assume that you're saying, and if you're not then correct me, that the respondent knew that Judge Kanarek had made the order confidential and yet nevertheless went ahead and however he obtained the copy, and that we'll get to—another crime, but however he obtained it, published it knowing that Judge Kanarek had ordered it made confidential. Now in the orderly process even though we are dealing with a First Amendment apparatus, wouldn't it have been better if Judge Kanarek's order had been appealed or attempted to be modified before completely disregarding that portion of the order?

MR. LORD: Your Honor, if I misspoke myself, I—

THE COURT: Well, that's what I gathered.

MR. LORD: The point I was trying to make was that whatever the purpose of enforcement of this sealed record statute may have in another instance, it doesn't serve that purpose here because all of the matters have previously been disclosed. In—in all other cases that the witness is familiar with and that I am familiar with, uh, there hasn't been this tremendous public outcry and this public discussion.

THE COURT: Well, I'm sure—

MR. LORD: That was—that was—

THE COURT: I'm sure that that's true.

MR. LORD: That was merely my point. That the enforcement of the statute here doesn't accomplish the same purpose that it would in 99.9 percent of the other instances.

THE COURT: But there was a judicial determination that it should be made confidential in accordance with the provisions of the juvenile procedure statute, wasn't it?

MR. LORD: Absolutely, Your Honor.

THE COURT: And the respondent was ware of that. I can only assume that from what you have said. That being true, wouldn't that have been the more prudent and wiser—you're quarreling I think with the decision of the Judge an maybe you're correct—

MR. LORD: No, Your Honor.

THE COURT: Well, you may be correct—yes, you are because you say that the previous matters that have been already disclosed were far more, uh, well onerous and odious than the matters that were contained in this order so that really there was no damage.

MR. LORD: No, Your Honor. I'm not quarreling with the Court's decision or the Court's decision to make that order confidential.

THE COURT: Because this—

MR. LORD: And—and—that is not my quarrel. Judge Kanarek did absolutely what he should have done, the law requires him to do what he did. As an officer of the court, I would obey that statute and would never reveal the contents of that order and would hope that no officer of the court would do that or that anyone else would do that. It did happen here. It was revealed to a reporter of the *Stuart News* who published it.

The question before the Court is not whether or not it would have been more prudent. And again as an attorney, I would agree with the Court's proposition that it would have been more prudent to wait for that to happen. It didn't happen here. And now the question is whether or not the reporter can be compelled, uh, to reveal it.

Uh, Judge what you say, uh, that was appropriate—I saw—I don't do this very often, but I was going to use this in rebuttal, but you may find this amusing. Alex Datortville (phonetic) a Frenchman who wrote extensively on the United States once said—

THE COURT: I've read some of his writings.

MR. LORD: He said, in order to enjoy the inestimable benefits that liberty of the press insures, it is necessary to submit to the inevitable evils that it creates. And I'm not saying that an evil was created here. I certainly would not concede that. But the fact is what we're arguing here is the freedom of the press and the First Amendment and balancing that against—

THE COURT: I—I have no quarrel with the First Amendment. I believe that to be a very valuable right that has to be protected and nurtured. I agree. The Supreme Court of Florida, the Supreme Court of the United States has spoken to that issue and I subscribe to it completely. However, there are other intervening rights and obligations that are interwoven between the obligations that are raised by the First Amendment and that's what we're weighing now.

MR. LORD: Absolutely.

THE COURT: I'm sure you realize that.

MR. LORD: Yes, Your Honor.

THE COURT: I—I have no quarrel with First Amendment rights. I don't belittle them and I don't ridicule them and I don't minimize them.

MR. LORD: Your Honor, it's, you know, as we see it, I see the *Huststetler* case as a case that is analogous to the case that you have here. There you have a Taylor Tribune reporter that obtains through a confidential source information about an ethics violation and a complaint made to the ethics commission, that is by statute—the statute prohibits the disclosure of that—we've got politicians who, I would imagine, jealously guard their reputations and their right to privacy.

THE COURT: There is some analogy between the *Huststetler* case, you're right.

MR. LORD: And in fact, the complaint is dismissed by the Ethics Commission basically a failure to demonstrate any cause—probable cause sufficient to go forward. There's the statute that prohibits the disclosure of the information, the reporter is subpoenaed by the Assistant State Attorney, just like you have here, the reporter moves to quash. Unfortunately, in that case the Circuit Court did find the reporter

guilty of civil contempt and denies the motion to quash, goes to the Fifth District—excuse me Fifth Cir.—yea, Fifth District Court of Appeals, they affirm the trial court's decision, it goes to the Florida Supreme Court. The Supreme court frames the issue as whether or not there is a privilege when subpoenaed in a State Attorney's investigation against revealing the identity of a source whose information violated Section 112.317. And we can just take that issue and substitute in the pertinent statute here and we have the issue in this case.

In *Tribune Company v. Huffstetler,* the Court holds—Supreme Court holds the privilege prevails. Accordingly, they quashed the District Court's decision and the reporter's contempt conviction was reversed. They, again in that case as I previously indicated, said you gotta judge each case on its own particular facts. And as we previously indicated, the participants in that case jealously guarded their reputations and their rights. They were terribly upset. Here the parents have openly discussed the matter so there is a distinction to be drawn, but it is in favor of Mr. Roche, not against him. There is no evidence that the parents jealously guarded their reputations.

In *Huffstetler* the Court also said something else. They said that in that case the "societal interest under pending most criminal statutes" was not present. And I would submit that the same is true here. The—most criminal statutes are based on conduct other than the conduct of the nature of what we have here. The disclosure of a court order is based on—I don't know how to describe the conduct—I know a crime when I see it. But there's a different societal interest in enforcing the criminal statutes or what you have in *Morejon v. Miami Herald Publishing Company* or someone is an eyewitness to it than what you have here where someone discloses confidential information.

We would submit that no one was injured by the disclosure of this information. Indeed in light of the enormous publicity, it could be argued that societal interests were served by the disclosure of this information for a very powerful message was sent to all Floridians. And that message was you can't abuse your children and maintain your parental rights. Certainly the privacy rights of the child had already been violated by others.

The State sort of in their memorandum anyway comes at it from a little bit different direction. They say we don't have to concentrate on this child so much as we can look at all children or future incidents.

But both the United States Supreme Court in *Branzburg* and the Florida Supreme Court in *Huffstetler* clearly stated that you gotta judge each one of these on its own merits.

And in *Morgan v. State,* the Court goes further. It says, "we cannot accept the view that generalized interest and secrecy of governmental operations" in that case I believe it was the grand jury proceeding "should take precedence over the interest in assuring public access to information that comes to the press from confidential informants. Citing non-specific interests even in keeping the inner workings of the Pentagon secret have been held insufficient to override First Amendment interests.

Now in *Morgan* you've got a reporter, the State Attorney seeks to hold him in contempt, uh, for refusal to disclose information regarding a grand jury presentment. There we have a presentment that in it is, uh, critical of an unindicted person, the Chief of Police of Dade County. Uh, and the—it was a State Statute that says the grand jury presentments that are critical of unindicted persons won't be disclosed until those people have had an opportunity to move, I believe the statute uses the word, repress that information or move to repress it, Section 905.28.

In *Morgan* the criticism of the Dade City Chief of Police was published before he has the opportunity, his name was Mr. Nixon, and the Court noted that Mr. Nixon's apparent loss of this right of privacy was the only specific interest that had been alleged. The *Morgan,* Court notes that there was never any specific showing that the Chief of Police suffered actual harm. The implication of *Morgan* is that you've got to demonstrate the actual harm. Based on the record before the Court in *Morgan, Morgan* decision held in favor of the reporter. And *Morgan* notes in a rhetorical question, if the mere possibility of injury to private reputation is—justifies (indiscernible) that a reporter divulge his sources, in what circumstances would a reporter not have to give the names of his confidential informants? The Court goes on to answer that rhetorical question. It says "the First Amendment is clearly implicated when government moves against a member of the press because of what she has caused to be published. These contempt proceedings were not brought to punish violation of a criminal statute and were not part of an effort to obtain information needed in a criminal investigation. Their purpose was to force a newspaper reporter to disclose the source of public—publish information so that the authorities could silence the source". The present case falls squarely within the language of *Branzburg* which says, official harassment of the press undertaken not for the purpose of law enforcement, but to disrupt the reporters relationship with his new sources would have no justification.

Your Honor, this isn't a criminal statute we're investigating here. The punishment for this is contempt in the other proceeding. The question is raised how this subpoena issued in this independent criminal investigation when in fact there's no criminal statute being investigated. The punishment is contempt for revealing the information, but it's not contempt against my client. The subpoena should have been issued in the dependency proceeding and the investigation should have flown out of that.

That fact notwithstanding, we're before the Court today. The purpose of this investigation is to silence the source. It's not to punish anyone, it's not because this man violated a criminal statute, it falls squarely within this language in *Morgan*. And we would suggest that *Morgan* and *Huffstetler* control this situation. They are extremely close on the facts.

Now Your Honor, we have filed an extensive memorandum of law with footnotes and articles attached and they discuss several other cases, all of which we contend support our position and we would ask if the Court would take the time to review that—

THE COURT: I'm going to Mr. Lord. I appreciate both of you have filed a rather extensive brief and I have not had the opportunity to really study it in any detail, which I am going to do. But I appreciate your remarks here because I am very concerned with this case—

MR. LORD: Thank you, Your Honor. And I would commend opposing counsel for the brief that they have filed. I believe that we do not have an intelligent discussion of the issues here before the Court in those briefs.

But Your Honor if I might in closing indicate—

THE COURT: Yea.

MR. LORD: The press is always going to publish materials with various branches of our government and even those of us who are not in government are going to find displeasing. Whether those people are presidents or legislators or governors or judges. And obviously Judge Kanarek found this displeasing and I don't blame him. Nevertheless, Your Honor, our forefathers sought to adopt the First Amendment to the Constitution because they recognized that a free press was essential to informing the public and to run our democracy. And I believe it was Thomas Jefferson who said in 1787, if it were left for me to decide whether we should have a

government without newspapers or newspapers without a government, I would not hesitate a moment to choose the latter.

In light of the facts surrounding this case, Judge, there's been no damage, there's no societal interest that's going to be supported by enforcing this statute under these circumstances, not in light of the conduct of the parents and the conduct of HRS and the conduct of the State Attorney's Office in prosecuting this matter and openly discussing it with members of the press, not in light of all the articles that have been published regarding this child.

We would respectfully request that you enter an order quashing this and otherwise protecting Mr. Roche against the inquiries of the State as to the sources of this confidential information. And, Your Honor, I do appreciate your time.

THE COURT: Mr. Barlow.

MR. BARLOW: If it please the Court, Mr. Lord, Your Honor. Judge, we have in this case not only the societal interest in protecting children, but the interest of protecting Charlotte Puffenburger. That was the interest that Judge Kanarek had as he sat where you sat in closing this proceeding to the public, to the press and not allowing that to be published as to what his ultimate opinion would be in the case and his order in the case. Because he recognized that Chapter 39 of Florida Statutes provided by the Florida Legislature to protect children, the Legislature from acting to protect children.

What we have here today, Your Honor, is if we allow the press to go behind Judges' orders, to go behind the Florida Legislature and disregard Chapter 39, they simply then can violate the Judge's order at anytime they choose. Publish the order because they feel it is in society's interest to publish what the Judge said they could not, rather than appeal that

Judge and take that Judge to the appellate court on that issue in advance, which could have been done in this particular occasion. They could have contested the closure of the proceedings to the public immediately to the Fourth District Court of Appeal, they chose not to do so. What they choose to do so was to go behind the Judge's order, go behind Chapter 39, obtain a copy of the order in the manner in which they did and then publish it.

Your Honor, not only did they publish it, but they flaunted their actions. If you look at—and Mr. Lord has provided a copy in one of his exhibits, Your Honor, the article from May 30 in the *Stuart News* which Mr. Roche wrote is this. "Kanarek's order was sealed from public inspection Tuesday because of the State's statutes requiring confidentiality in termination cases, but a copy was obtained by the *Stuart News* in St. Lucie News". They flaunted it—they flaunted it that the Judge required it to be closed to protect the child and yet they still said, but we got it anyway and we're going to publish it.

That means Judge that Chapter 39, the Florida Legislature's determination upheld by the Florida Supreme Court and the confidentiality of those proceedings is worthless. Mr. Roche has decided on his own to take Chapter 39 and destroy it. He doesn't care about the confidentiality of Charlotte Puffenburger or any child in any future proceeding. And that's the danger that he himself as a member of the press has made a decision that the interests of the child are outweighed by society's interest. Rather than letting the Courts make that determination in a hearing before the justices which have the highest standard of duty of protecting all of society's interest and rights. He alone has made that decision in advance. And that is total improper. We would do away with Chapter 39 and the legislative acts, we would do away with the Florida Supreme Court holding that Chapter 39 has provisions for confidentiality and closure

which are proper and he has made that decision on his own that he is not going to follow those regulations.

Your Honor, we go back to *Branzburg* case and that is a case by case analysis and that is what we are asking you to do in this case. Looking at this case on a case by case analysis to determine whether or not the limited qualified privilege which the press enjoys in certain circumstances shall apply in this particular case. And I would suggest strongly, Your Honor, that it should not and does not in this particular case.

The qualified privilege does not apply in this case, Your Honor, because Mr. Roche is more than a reporter. He is in fact as in *Morejon,* a witness. He is a witness because he did not just have a confidential source in this case that told him something, he had a source which provided him illegally with a copy of the order. An order that had been sealed by Judge Kanarek. Provided him physically a copy of the written order. That is an act—not just a source but an actual act in violation of Chapter 39. That is the criminal act we have in this case. The act which Mr. Roche was a witness to. He is alone the source who can provide who is that person that provided the copy of that order in this case.

In that respect it's very similar to the *Morejon* case, he is a witness to the receiving of a physical object in this case and that makes him under the *Morejon* case—has no privilege. But assuming that he has a qualified privilege, Your Honor, that he has a qualified privilege, then that qualified privilege of the First Amendment is not stronger—is not higher than the rights and protections that the Florida Legislature has given to children and given to the trial judges of this State to protect those children. In which Judge Kanarek attempted to protect those children and attempted to protect the child in this case by closing these proceedings.

We had guardian ad litems appointed to protect the children, we had Judge Kanarek protecting the interest of the

child. Because as the guardian ad litem said in this particular case Judge, yes there had been prior publicity in this case, but the most damaging thing in this case was to the esteem of the child when a Judge said your mother wasn't protecting you, your father wasn't protecting you. Those words published in the newspaper, which couldn't have been published without obtaining a copy of the order were published. And that was the destruction to the esteem of Charlotte Puffenburger.

But it goes not only to the danger of Charlotte in this case, but the danger to violations of Chapter 39 across the board, all across the State and certainly within this circuit. That is the danger we are facing in this case if we allow the press to go behind Judges' orders.

Your Honor, there certainly is no chilling effect in this case. Mr. Lord didn't use the words chilling effect, but that's certainly what the *Branzburg* case talks about. For the *Branzburg* case and the concurring opinion of Justice Powell is very strong on that. There are mechanisms within our system to quash subpoenas, to protect and go before the judges of this State to protect the interest of both the press and the general public. If they believe that the State Attorney's Office is attempting to chill their sources, they can certainly come before Your Honor or any other judge and attempt to quash those subpoenas or move in another mechanism to prevent the State from subpoenaing them to reveal their sources in the appropriate cases.

The *Branzburg* case, however, did not give the press free reign. They recognized only a qualified privilege under the First Amendment.

And the Florida Supreme Court noted in the *Morejon* opinion, in the footnotes in that case, is that the Florida Legislature refused to adopt a shield for reporters, a privilege and put it in our evidence code or adopt a statute of

shield in that case because their rights only stem from the First Amendment—no additional source in Florida law. And that that is only a qualified privilege.

Your Honor, you're being called upon in a difficult job to weigh the First Amendment versus society's interest in children—Charlotte Puffenburger's interest in this particular case. The Florida Legislature has said, Chapter 39 is the tool that shall be used by the judges of this State to protect children. Judge Kanarek used Chapter 39 to protect children. Mr. Roche acting in his reporter capacity decided not to listen to Judge Kanarek or follow the Florida Legislature and act on his own and obtained that order in this case.

Mr. Lord argues that the publicity in this case—the damage was already done in advance he said. The damage was already done due to the widespread publicity. The damage was done—if he's saying the damage was done and he did, the damage was done by Mr. Roche and the members of the press. The damage wasn't done by anyone else. They were the persons that reported it and caused the damage in this case. And what they are arguing is, since we already caused the damage, we couldn't cause any further damage so what does it matter that we violated Chapter 39? What does it matter that we violated the Judge's order? The damage was already done. What they are saying is that they can get away with things and violate a person's rights—the laws of the State and the Judge's order, then it's ha-ha-ha, it's too late, the damage is already done. And that is a sad situation because members of the press also have to follow the law in this Country. And that you, Your Honor, have to weigh and balance whether the First Amendment in this case or the rights of Charlotte and children in this particular case and children in other situations protected by Chapter 39 and the Judges in this State are to be given—be given (indiscernible) and strength in this case or whether the press can make on their own decisions to go behind the law.

Your Honor, I would suggest that there is no more valuable resource in our society than children. And that's why we move to protect them and keep these things confidential.

The press decided on their own in this case that the child's interest was outweighed by the public's interest in a case. The public's interest that they created through their publicity and that they continue to foster through their publicity. It may be appropriate in some circumstances, but not when you damage the life of a child that has to go through life damaged with esteem.

And not only in this case but in all cases of children. We have to look at the long-term interests of the children and the long-term interest of society. And that is not done by the press. They're interested in doing their job, writing an article, satisfying their editor and getting it out regardless of whose toes, judges or the legislature, that they step on.

They should have taken the appropriate actions to the appellate courts in this case. Challenge the closure of the hearing, challenge the closure and the sealing of the order in this case and they failed to do so. If there was so wide interest of publicity in this order and in this case then that interest would have remained when the appellate court reached their decision. It would have remained six months from now, six weeks from now, it would have remained when the appellate court made its decision. But they elected to be the ones that could flaunt it in the papers saying it was sealed but we got it anyway and we published it, ha-ha-ha. That is serious because it damages the children of this State. Thank you.

THE COURT: Do you want to respond Mr. Lord?

MR. LORD: If I could very briefly—very briefly, Your Honor. Your Honor, Mr. Barlow stood up here and ripped up a piece of paper that had Chapter 39 just for the benefit of

my sight, I'm going to rip up the First Amendment. The question here is a balancing test. We're not saying the Court should throw out Chapter 39 and I'm sure Mr. Barlow is not saying we shouldn't have the First Amendment to the Constitution.

Mr. Barlow really did not respond to *Huffstetler* or *Morgan,* except that he sorta seems to bring in the *Morejon* analysis. He says, wait a minute, this man is a witness to the crime. He physically got a copy of the order. That's the distinction that is drawn—the only distinction that is drawn.

In *Huffstetler,* the person was told something that violated—the reporter was told something that violated the statute.

Now lets look at *Morgan.* In *Morgan* where there is disclosure of information regarding the sealed presentment, and again we're dealing with a very similar set of facts, Statute says, shall not be revealed. In footnote 1 of page 952 the newspaper report was based on information that this passage was identified by petitioner as being based on confidential information. The grand jury reported, uh, criticized his officials but the jurors did level strong criticism at Nixon and other Dade County officials the *Times* was told. The jurors reportedly decided to keep a close eye on the Pasco County Building Department during the next 90 days and to meet again in the future to review (indiscernible). The unusual sealed presentment, reportedly was sealed at Williams' request. There you have a very similar case, the report itself—the newspaper article itself says I know that this is sealed, I know I shouldn't have this information. If they didn't see an actual copy of it, they came pretty close. They described in considerable detail what that presentment says.

The grand jurors were promised that its contents would be released within a week and it goes on. There's no distinction to be made here on the *Morgan* case The man is not

anymore a witness to the crime than the reporter was in *Morgan* or the reporter was in *Huffstetler.* It's a distinction without a difference, Your Honor.

My learned colleague has argued that generalized interest to protect the children should somehow prevail and again we would ask the Court to review the case law, specifically *Morgan* which says that you've got to focus on the particular case.

He seems to argue that the damage was already done, well it was done by the press because they wrote about it. The State Attorney's Office talked about it, HRS talked about it, the mother and father talked about it and the press wrote about it. A child died, that's worthy of press. It should receive press. And a powerful message needed to be send and was sent and the State Attorney's Office should be commended for that.

The fact is, Your Honor, regardless of what we personally feel about what went on here, we have to weigh the First Amendment and the protection that it affords.

That in these circumstances and in light of the law—in light of *Huffstetler* and *Morgan* and the other cases that we've cited to the Court, we would suggest they have failed to meet the compelling need requirement, prong two of that test. That this is an action that is merely intended to silence the source and not for a criminal prosecution and it's not a criminal statute.

It's a societal interest under pending most criminal statutes are not present here as indicated in *Morgan.* And for those reasons we would request that the Court grant the relief that we have sought. Thank you, Your Honor.

THE COURT: Thank you gentlemen. Uh, I'm going to take the matter under advisement and I'll rule as promptly as possible and I can't tell you when, it will be fairly shortly.

I appreciate the effort that you gentlemen have put into this case and, uh, I'm going to put forth the same effort. Thank you.

MR. LORD: Thank you, Your Honor.

MR. BARLOW: Thank you Judge.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO. 90-03071

L.T. CASE NO. 90-
1290CFA MARTIN COUNTY

IN RE: INVESTIGATION:
FLORIDA STATUTE, 27.04
SUBPOENA OF TIM ROCHE

Appellant,

vs.

Appellee.

AN APPEAL FROM THE CIRCUIT COURT FOR MARTIN COUNTY

APPELLANT'S INITIAL BRIEF

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* * *

PREFACE

The Appellant in this cause will be referred to herein as "Roche" and the Appellee shall be referred to as "the State." The following symbols will be used:

R.___ — Record on Appeal.

Tr.___ — Transcript of Hearings.

* * *

II. SUMMARY OF THE ARGUMENT

Under Florida law, records of termination proceedings are placed under seal and are accessible by only a small class of persons. *See* 39.411, Fla. Stat. (1982).[1] No legislative history exists to explain the purpose of requiring these records to be kept secret, but Florida common law indicates that statutes directing courts to place records in specific proceedings under seal are designed to protect the *privacy* interest of the parties to the proceedings. *See, e.g., Florida Star v. B.J.F.*, 499 So.2d 883 (1st DCA 1986), *rev'd on other grounds*, ___ U.S. ___, 109 S.Ct. 2603 (1989)(statute forbidding publication of name, address or other information identifying sexual offense victim enacted to shield information that is "of a

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1 The statute provides, in relevant part, that "The clerk shall keep all court records required by this part separate from all other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that . . . a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child." 39.411(c), Fla. Stat. (1982)

private nature"); *Cape Publications v. Hitchner,* 549 So.2d 1374 (Fla. 1989)(statute sealing records relating to reports of child abuse for purpose of protecting privacy of family). *See also* Tr. 10 (testimony of the Honorable Paul Kanarek that the purpose of § 39.411, Fla. Stat. (1982) is to protect "the participants and the child"). Thus, where, as here the parents in a termination proceeding have explicitly waived any "right to privacy" with respect to the proceeding, enforcement of the statute serves *no* legitimate purpose. Nevertheless, the State seeks to punish the source of Roche's information, and has seen fit to punish Roche in the interim for failing to identify that source.

Both the United States Supreme Court and this state's highest court have held that a "generalized" or "nonspecific" interest in keeping particular governmental proceedings secret is simply insufficient as a matter of law to overcome "the interest in assuring public access to information that comes to the press from confidential informants. . . ." *Morgan v. State,* 337 So.2d 951, 955 (Fla. 1976); *see Branzburg v. Hayes,* 408 U.S. 665, 710 (1972) (Powell, J., concurring) (a newsman's claim to the constitutional privilege to refuse to testify must be judged on the *specific* facts of the case, including the need of the government for the *particular* information the newsman possesses and whether the testimony will "implicate[] confidential source relationships"). [emphasis added]

In the proceedings below, the State failed to articulate a single *specific* interest that would be served by the forced disclosure of the identity of Roche's confidential source, and also failed to specify what compelling state interest would be advanced by that disclosure. The State therefore failed to shoulder its constitutional burden in this matter, for, under settled Florida law, disclosure of the identity of a confidential source may *not* be compelled *unless* and *until* the party seeking disclosure has shown that it has a compelling need for the information it seeks.

III. ARGUMENT

A. THE FEDERAL AND FLORIDA CONSTITUTIONS PROVIDE JOURNALISTS WITH A QUALIFIED PRIVILEGE TO REFUSE TO DISCLOSE THE IDENTITY OF CONFIDENTIAL OF CONFIDENTIAL SOURCES

In determining that the societal interests in this case outweighed the qualified privilege afforded Roche under the First Amendment and the Florida Constitution, the court below struck a constitutionally impermissible balance. Specifically, the court erroneously determined that the State's interest in protecting what is characterized as a generalized interest in children's welfare was a sufficiently compelling interest to overcome Roche's constitutional right to refuse to disclose the identity of a confidential source. The circuit court's decision should be reversed.

Under long-standing Florida law, news reporters enjoy a qualified privilege to withhold information concerning the confidential sources for their news stories. *See Tribune Co. v. Huffstetler,* 489 So.2d 722 (Fla. 1986); *Morgan v. State,* 337 So.2d 951 (Fla. 1976); *Gadsden County Times, Inc. v. Horne,* 426 So.2d 1234 (Fla. 1st DCA 1983); *Florida v. Abreu,* 16 Media L. Rep. (BNA) 2493 (Fla. 11th Cir. Ct. 1989). That privilege, as the Florida Supreme Court noted just last year, is based on "the protections of the first amendment to the United States Constitution and the corresponding protections offered by the Florida Constitution in article I, section 4." *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577, 579 (Fla. 1990). As the *Horne* court recognized:

> Subsequent to *Branzburg,* the trend among those courts that have addressed the issue of confidential sources is to recognize that a limited or qualified privilege does exist to protect the identity of

> such sources from forced disclosure absent a showing of compelling interest outweighing that privilege.

426 So.2d at 1237. The qualified privilege reflects the

> paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters . . . which has always been the principal concern of the First Amendment.

Baker v. F&F Inv., 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).[2] As a result of this "paramount public interest," the constitutions of both the United States and Florida require that *before* a journalist may be compelled to testify *in any proceeding*, the party seeking his testimony must provide substantive evidence that: (1) the reporter possesses information relevant to the proceeding; (2) the State has a compelling need for the information the reporter has; *and* (3) the party seeking the testimony has exhausted all alternative sources for the information. *See Horne*, 426 So.2d at 1241; *Tribune Co. v. Greene*, 440 So.2d 484 (Fla. 2d DCA 1983).[3]

Close appellate scrutiny of a trial court's adherence to the tripartite inquiry is particularly important where, as here, the information sought is the identity of a confidential news source, because, as the United States Supreme Court has held:

> official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.

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2 *See Branzburg*, 408 U.S. at 700 (requiring that a state's interest be demonstrably " 'compelling' " or " 'paramount' " "in order to justify even an indirect burden on First Amendment rights").

3 As Appellant has acknowledged, there is no dispute between the parties that the State has satisfied the first and third prongs of this test. R.38.

Branzburg, 408 U.S. at 707-708.

Whether the interest to be served by disclosure outweighs the reporter's qualified privilege must be analyzed according to the specific facts of the controversy at issue. The constitutional basis for such an inquiry can be found in Justice Powell's concurring opinion in *Branzburg,* 408 U.S. at 709-710, which was unequivocally embraced in *Huffstetler,* 489 So.2d at 723:

> the asserted claim to privilege should be judged *on its facts* by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

408 U.S. at 710 [emphasis added]. As Justice Powell noted,

> [t]he balance of these vital constitutional and societal interests on a *case-by-case* basis accords with the tried and traditional way of adjudicating such questions.

Branzburg, 408 U.S. at 710 [emphasis added]. *See Horne,* 426 So.2d 1234; *Morgan,* 337 So.2d at 955. Thus, as the Florida Supreme Court has held:

> We cannot accept the view that a *generalized interest in secrecy* of governmental operations should take precedence over the interest in assuring public access to information that comes to the press from confidential informants. . . . A *nonspecific interest,* even in keeping the inner workings of the Pentagon secret, has been held insufficient to override certain first amendment interests.

Morgan, 337 So.2d at 955 [emphasis added; citations omitted].

B. THE CIRCUIT COURT ORDER SHOULD BE REVERSED BECAUSE THE STATE CANNOT SHOW A COMPELLING NEED FOR ROCHE'S TESTIMONY.

The issue now before this court is whether the State's generalized interest in enforcing its laws is sufficiently compelling in his instance to overcome Roche's qualified privilege to refuse to name his confidential source. Tr.47, 49-51. Cf. *Morgan,* 337 So.2d 951.[4]

Appellant does not mean to suggest that the State's interest in enforcing its laws in general, or its interest in enforcing the particular law at issue here, is not an important and socially beneficial interest. However, the State did not (and cannot) show a compelling interest in the enforcement of laws within the framework of the *particular* circumstances of *this case.* The State therefore did not (and cannot) meet the constitutionally required burden it must shoulder in order to overcome Roche's privilege not to testify. *See Horne,* 426 So.2d at 1241.[5]

Given their extensive and deliberate contact with the press and the public, and the widespread notoriety of their case, both Cheryl and Carl Puffinberger clearly waived any privacy interest they may have had in the termination

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4 In *Morgan,* a newspaper published criticism contained in a grand jury presentment before the subject of presentment had an opportunity to file a response. In reversing the contempt conviction of the reporter who had refused to disclose the source of the grand jury information, the Florida Supreme Court implicitly held that neither the reputational interest of the subject of the investigation, nor the State's generalized interest in keeping grand jury proceedings secret were *sufficient* to overcome the interest in protecting confidential sources. 337 So.2d at 955-956.

5 Florida case law also suggests that the compelling interest to be served be demonstrably " 'immediate, substantial and subordinating,' " before disclosure may be ordered. *Morgan,* 337 So.2d at 955 n.10.

proceedings. R.77. Additionally, the State failed to demonstrate that any actual harm has occurred or would occur to Charlotte Puffinberger as a result of the publication by *The Stuart News,* and instead based its ruling on speculation and conjecture. Tr.56-59.[6]

Importantly, moreover, the State utterly failed to show how forcing Roche to reveal the name or names of his source(s) would served any socially beneficial purpose. The court below therefore improperly concluded that societal interests outweighed the first amendment interests in this particular case. R.108. Indeed, the circuit court failed to even mention Charlotte by name, much less identify specifically what harm had come, or could come, to her. R.106-109.[7]

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6 The State's Memorandum In Support Of Order To Show Cause fails to recite any harm whatsoever to Charlotte as a result of the article published May 30, 1990. R.91-105.

At oral argument, the state called Charlotte's guardian ad litem, Margaret Scarborio, as a witness. Tr.23. The following colloquy occurred:

Q [by Mr. Barlow] Do you have an opinion as to whether or not [the article quoting Judge Kanarek's termination order] was harmful to Charlotte's interest in having that published publicly?

A[Ms. Scarborio] *I believe* it's harmful to Charlotte. Uh, *if she were to read these statements* that the judge made, *I believe* her self-esteem *could* be extremely *damaged.* [emphasis added]

7 Rather than speak about the interests of the participants in *this case,* the circuit court instead spoke to generalized interests:

In this case the societal interests are enorously [sic] important to *all* citizens since the statutes involved are designed for the protection of juveniles from influences deemed harmful to their progress. [emphasis in original]

R.108.

1. A Generalized Interest in the Protection of Children Is Insufficiently Compelling to Overcome the First Amendment Privilege Here.

The harm suffered by Charlotte Puffinberger stems from the gruesome circumstances of her family life, not from the publication of one article published by *The Stuart News*. That harm arose from the pattern of child abuse in the Puffinberger home that began some time before November 1988. Following the death of her half-sister, Charlotte endured numerous other traumatic events, including her removal from her home and parents, the sentencing of her father to ten years in prison for aggravated child abuse, the jailing of her mother for neglect, the abdication of parental rights by her father, a custody battle between state officials and her mother, and the official termination by a court of her mother's parental rights. Tr.28-33. *Each* of these events received widespread publicity.

Despite these traumatic events, the State argued below that the publication of a single newspaper article threatens the child's emotional well-being. Tr.58. Yet the State did not produce any actual evidence of such harm. Rather, it relied solely on suppositions of what the future may hold for her. Tr.56-59. The State's argument that publication of the contents of the Order would lead to the "destruction of the esteem of Charlotte Puffinberger" (Tr.56) was also based on a legally insupportable theory — namely that, as the child's guardian *ad litem* testified: "Uh, if [Charlotte] were to read these statements that the Judge made, I believe her self-esteem could be extremely damaged." Tr.27. Thus, according to the State, although "there had been prior publicity in the case . . . the *most damaging thing* in this case was to the esteem of the child" which was the sole and direct result of publication of the Order — an Order, the State implied, which Charlotte would never know about absent publication by *The Stuart News*. *See* T.56. What the State overlooks in making this assertion, however, is the fact that the statute itself *permits a child to read the contents of a*

judge's order terminating parental rights. See § 39.411(3). Additionally, the State failed to introduce any evidence whatsoever that Roche's testimony would alleviate any of the alleged harm publication of the story supposedly caused. There simply is no compelling interest that disclosure could possibly serve.

In light of *Morgan,* this court cannot accept the State's view, nor the view of the circuit court, that a generalized interest in protecting children should defeat the important interests of Roche. When this case is looked at on its facts, and not on mere assumptions made by the State, the balancing of interest clearly falls in favor of Roche.

2. Because The State Failed to Produce Any Credible Evidence of a Compelling Need for Roche's Testimony, Roche and The Stuart News Can Only Speculate As to the Underlying Purpose of the Proceedings Below.

Given the lack of probative evidence that a compelling interest would be served by forcing Roche to identify his confidential source here, Roche and *The Stuart News* can only speculate as to the motives of the State in proceeding with its contempt motion. Indeed, the State's arguments below seem to be punctuated with ulterior motives not pertinent to the balancing test required by *Branzburg.*[8]

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8 At oral argument, for example, the State's attorney stated that, in accurately reporting and publishing the circumstances behind the receipt of Judge Kanarek's decision, Roche and *The Stuart News* somehow "flaunted their actions" (Tr.53). The State also made the unsupported and insupportable claim that Roche "doesn't care about the confidentiality of Charlotte [Puffinberger] *or any child in any future proceeding"* [emphasis added] (Tr.54); insinuated that Roche was a co-conspirator to a *criminal* act (Tr. 55); and made the ridiculous assertion that the harm perpetuated upon Charlotte was really the fault of Roche and other reporters "[t]he damage [to Charlotte] was done by Mr. Roche and the members of the press. The damage wasn't done by anyone else." R.57.

In argument below, the State also made the legally specious argument that his case factually resembles *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 577 (Fla. 1990). R.55. In *Morejon,* however, the court upheld the contempt conviction of a reporter who was an *eyewitness* to a public police search and arrest of a criminal defendant. That simply is not the case here. Indeed, as the *Morejon* court itself noted:

> . . . Unlike the factual situations in *Branzburg, Morgan,* and *Huffstetler, there is no confidential source involved in this case which may "dry up" if revealed.* [emphasis added]

Morejon, 561 So.2d at 580. Here, of course, Roche did not observe any potentially criminal activity. Instead, he merely received and published information of obvious interest to the public. There is *no* evidence suggesting that Roche misappropriated Judge Kanarek's decision, the State's insinuation to the contrary.[9]

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9 Furthermore, a reporter cannot be held liable for another's illegal actions to which he has not participated. *See Pearson v. Dodd,* 410 F.2d 701 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969) (fact that newspaper columnists received copies of documents knowing they had been stolen from the office of a United States senator did not render the columnists liable for invasion of privacy based on intrusion).

3. Enforcement of the Subpoena Threatens the Public's Interest in Receiving Important News.

The court's decision below effectively punishes Roche for performing his function in society: the gathering and dissemination of news.[10]

In this situation, the news gathered and disseminated was of extreme public importance and interest.[11] Moreover, the disclosure of the news did *not* create the litany of harms hypothesized by the State. Indeed, there are no facts *in this case* that demonstrate why the State's generalized interest in enforcing its laws or in protecting the well-being of children are sufficiently compelling here to overcome the first amendment privilege held by Roche to refuse to identify a confidential source. There is a legitimate concern for the interests of children in family and judicial matters such as these, yet the *facts in this case* do not support the State's

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10 The United States Supreme Court specifically noted the importance of public scrutiny of judicial proceedings in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), where it explained that when court proceedings have

been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

448 U.S. at 571. Indeed, public scrutiny of the functioning of the judicial system, particularly in well-publicized and emotional case of child murder, "fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper v. Superior Court*, 457 U.S. 596, 606 (1982).

11 Publicity about another Florida case — in which an abused child had been returned to his home and was subsequently murdered by his stepfather — heightened public interest in Charlotte's eventual placement. Indeed, given the enormous public interest in the fate of Charlotte, and her mother's lack of interest in keeping that fate secret, common sense dictates that societal interests were served — rather than undermined — by the disclosure made to Roche and the subsequent publication.

assertion that harm has come to *this child,* or that society would be better served without receipt of the information published by *The Stuart News;* or that forcing Roche to disclose the source of that information would serve any identifiable purpose whatsoever.

The facts of this case do not warrant the contempt conviction imposed on Roche. The State has failed to demonstrate a compelling need for the information it seeks. As the Florida Supreme Court has held:

> The First Amendment is clearly implicated when government moves against a member of the press because of what she has caused to be published.

Morgan, 337 So.2d at 956. As a result, where

> contempt proceedings [are] not brought to punish violation of a criminal statute and [are] not part of an effort to obtain information needed in a criminal investigation . . . [but are for the] purpose [of forcing] a newspaper reporter to disclose the source of published information, so that the authorities could silence the source,

they will not be tolerated. *Id.*

IV. CONCLUSION

The trial court below erred in holding Tim Roche in contempt for his refusal to testify and Mr. Roche respectfully requests that his court reverse the decision of the court below and that his court further direct the court below and that this court further direct the court below to enter an order granting Roche's Motion to Quash.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 90-3071

**IN RE: INVESTIGATION:
FLORIDA STATUTE, ETC.,**

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN AND FOR
MARTIN COUNTY, FLORIDA
CRIMINAL DIVISION**

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was a witness subpoenaed to testify in an investigation being conducted by the State Attorney's office in the 19th Judicial Circuit in and for Martin County, Florida. Appellee was the State Attorney conducting the investigation. In this brief, the parties will be referred to as both Appellee or State and Appellant or Reporter, Tim Roche, the witness under subpoena.

In this brief the symbol "R" will be used to denote the record on appeal; all emphasis is supplied unless otherwise indicated.

SUMMARY OF THE ARGUMENT

While Florida and Federal Courts recognize a reporter's privilege not to disclose his sources in certain circumstances, there are limitations on that privilege. Where societal interests in requiring certain proceedings to remain confidential outweigh the media's first amendment rights to access to court proceedings, a reporter's privilege must give way. In determining which interest is greater, a court must consider three factors: whether the reporter has relevant information, here he stipulated he had; whether the State has exhausted all alternative sources of the information, here it was stipulated the State had; and whether the State has shown a compelling need for the information.

Below, the State established that Florida Statutes prohibit disclosure of juvenile court files and proceedings to the public, under penalty of the court's contempt power. As it is well established that society's interest in protecting participants in juvenile proceedings from public scrutiny outweighs the media's interest in receiving news, the qualified privilege to protect their sources enjoyed by reporters in some circumstances was not applicable here. As Mr. Roche acknowledged being the sole source of information as to who disclosed the confidential court order in violation of Chapter 39, the State clearly established its compelling need for his testimony, and Mr. Roche was properly held in contempt for his failure to provide information needed in the State's criminal investigation.

ARGUMENT

POINT I

THE FEDERAL AND FLORIDA COURTS RECOGNIZE JOURNALISTS HAVE A QUALIFIED PRIVILEGE TO REFUSE TO DISCLOSE THE IDENTITY OF CONFIDENTIAL SOURCES IN CERTAIN CIRCUMSTANCES (RESTATED).

Appellee agrees with Appellant's basic contention that both the State and Federal courts have recognized that a reporter has qualified privilege to protect his sources of information by refusing to disclose the identity of those sources; however, there are both state and federal limitations on that privilege and in this case, the trial court properly found the societal interests in denying the privilege outweighed the Constitutional interest in freedom of the press.

In *Morgan v. State,* 337 So.2d 951 (Fla. 1976), the Court adopted the balancing test enunciated by the U.S. Supreme Court in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), noting that "no such privilege can amount to an absolute right to an unimpeded flow of information in all places and at all times." *Morgan* at 954. The Court has further held that "every such claim of privilege 'should be judged on its fact by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.'" *Tribune Co. v. Huffstetter,* 489 So.2d 722, 723 (Fla. 1986). The *Branzburg* balancing test, adopted by the Florida Supreme Court in *Morgan, supra,* requires consideration of three factors: a) whether the reporter possesses information relevant to the proceeding; b) whether the State has a compelling need for the information the reporter has; *and* c) whether the party seeking the testimony has exhausted all alternative sources for the information; in

reviewing these factors, a court must strike a proper balance between constitutional and societal interests. *Miami Herald Pub Co. v. Morejon,* 561 So.2d 579 (Fla. 1990). Below, Appellant stipulated that the State has met factors, a) the reporter possesses relevant information, and c) the State has exhausted all alternative sources for the information. The Appellant asserts the State has failed to show that it has a compelling need for the information, thus Appellant reasons the State has failed to show that Mr. Roche's privilege of nondisclosure has been overcome.

The State disagrees with the Appellant's analysis in that Appellant begins by presuming that he possesses a privilege to be overcome; rather the State's position is that, under these circumstances, Appellant has *no* privilege to refuse to obey the State's subpoena and the trial court's order.

In *Morejon,* the Florida Supreme Court held that reporter has "nor privilege, qualified, limited, or otherwise" which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent court proceeding.; The court noted that the fact that the reporter was on a news gathering mission when he witnessed the event in question did not alter their decision. The State asserts these are precisely the circumstances of the instant case; the reporter, Mr. Roche, is the only eyewitness to the event in question, that is, the disclosure of a confidential court order. Thus, Mr. Roche has *no* privilege to refuse to obey the trial court's order of disclosure and the trial court's order must be affirmed.

POINT II

THE CIRCUIT COURT'S ORDER MUST BE AFFIRMED BECAUSE THE STATE HAS SHOWN A COMPELLING NEED FOR ROCHE'S TESTIMONY.

Appellant asserts that the State failed to show a compelling need for his testimony in this case because, a) given the prior widespread publicity regarding the parents of Charlotte Puffingerger, no harm could come to the child as a result of further publicity, and b) that no socially beneficial purpose would be served by requiring Appellant to disclose his source of the confidential court order. Contrary to Appellant's arguments, below the State did show that Charlotte Puffinberger could well be harmed by disclosure of matters contained in the trial court's confidential order terminating her mother's parental rights (R. 27-28, 32-33, 108) and the trial court cited several purposes beneficial to society which are served by compelling disclosure in this case (R. 107), thus the trial court's order compelling disclosure must be affirmed.

1. A Generalized Interest in the Protection of Children is Sufficiently to Compelling to Overcome the First Amendment Privilege Here.

Below, the child's GAL who was a practicing family therapist, testified that the child's best interests were served by protecting her from further notoriety, and by not disclosing to the child contents of the trial court's confidential order which indicated the child's mother did not care about her (R. 25-28). The GAL testified that such information can damage a child's self-esteem which can negatively affect the child's entire life; she felt that, notwithstanding the widespread publicity already given the case, publication of the order could be particularly damaging to the child because it was a judge's findings and not merely an article (R. 27-28,

32-33). Appellant's contention that since F.S. § 39.41(3) allows the child to view these closed files (actually F.S. § 39.471(3) is the statute applicable to termination proceedings), begs the question; first of all in this case the child is three years old, consequently it is doubtful she would have read this order herself, the danger is that some well-meaning (or less than well-meaning) adult will read the order and relate their impression to the child. More importantly, to the extent this child will one day reach an age and stage in life where she seeks out and reads the order of termination, her conscious choice to avail herself of this information is a far cry from having it published in a newspaper, without her knowledge and consent or any regard for its impact upon the child's emotional well-being. Thus, below, there was ample, unrebutted evidence that this child, whose interests the juvenile court expressly sought to protect, could be damaged by disclosure of the confidential order.

Further, Appellant's contention that a generalized interest in protecting children is insufficient to constitute a compelling reason to overcome a reporter's qualified privilege to refuse to disclose his confidential sources is *not* supported by Florida case law. The Florida Supreme Court *In Re: Adoption of H.Y.T.,* 458 So.2d 1127 (Fla.1984), upheld the Constitutionality of F.S. § 63.162(1) against a press challenge that this statute which closes adoption proceedings was overbroad and did not outweigh the media's first amendment right to access to court proceedings. The Court found that the Florida Legislature, in enacting F.S. § 63.1162(1), had recognized "an overriding public policy of protecting from harmful publicity, parties to and the subject of adoption proceedings", proceedings in which the court's primary duty is to serve the best interests of the child. *Id* at 1128. In *H.Y.T.,* the Court expressly rejected the media's argument that, as there had already been widespread publicity in the case, the child's right to privacy had already been destroyed, noting that to accept such an argument was to place on the child's

shoulders the burden of proving the need for protection which the people of the State, through the legislature, have already determined is necessary.

In *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988), the Second District upheld the contempt conviction of a reporter who published information contrary to F.S. § 39.408 and the trial court's order. There, the Second District held that F.S. § 39.408(2)(c) (which requires confidentiality and closure of all hearings involving . . . custody . . . and permanent placement of the child), was indistinguishable from F.S. § 63.162(1), thus the Florida Supreme Court's decision in *H.Y.T.* was controlling. The Second District held that, in light of *H.Y.T.,* the restrictions imposed by F.S. § 39.408 were constitutionally valid and required not only that the custody hearing be closed to the public but also that the proceedings be *confidential. Id* at 1175.

Below, there are several subsections of Florida Statutes which could have been, or were relied upon by the trial court: Section 39.411(3) [relating to actions in juvenile dependency matters] provides that the clerk *shall* keep all these court records separate from others and *shall not* open them to the public; violation of this subsection is punishable by contempt.

Section 39.467(5) [relating to actions terminating parental rights, now F.S. § 39.467(6)(1990)] provides that all hearing involving termination of parental rights *shall* remain confidential and closed to the public.

Section 39.471(3)[relating to termination of parental rights, now F.S. § 39.471(4)(1990)] provides that the clerk *shall* keep all these court records separate from others and *shall not* open them to the public; violation of this subsection is punishable by contempt.

Clearly each of these sections limits the media's access to information regarding these proceedings, clearly these sections of Florida Statutes, like F.S. § 39.408 and F.S. § 63.162 are legislative recognition of an overriding public policy of protecting children and parties to these proceedings from harmful publicity and are designed to assist courts in serving the best interests of children. Simply because there has been prior publicity about a case does not diminish a child's right to protection from statutes enacted for their protection. *H.Y.T.* Here, the information which Appellant asserts he was privileged to make public without revealing his source, is information which Florida's Legislature and Court's have repeatedly recognized as confidential and public policy of protecting children from harmful publicity overrides the media's interest in protecting its source who disclosed a confidential court order in violation of valid Florida Statutes. Indeed, as noted by the Florida Supreme Court in *H.Y.T.,* any impairment in the media's ability to report on these matters affects only matters of newsworthiness, not matters of real public or general concern, thus the impairment of the press's First Amendment privileges are minimal. There is ample authority that the State's interest in protecting children from harmful publicity takes precedence over the media's interest in assuring public access to information adduced in these proceedings, thus the trial court's findings must be affirmed. *H.Y.T.; Mayer.*

2. As the State Produced Ample Credible Evidence of a Compelling Need for Roche's Testimony, Roche Was Obligated to Comply with The Trial Court's Order That He Comply With The Subpoena And Disclose His Source of the Confidential Material (Restated)

Apparently Appellant is arguing herein that the State, having failed to show a compelling interest in obtaining the source of Mr. Roche's information, can show no purpose in pursuing contempt proceedings against Mr. Roche. As previously argued in Point II, 1., Supra, the State did show a compelling interest in obtaining the name of the source known only to Mr. Roche. Contrary to Appellant's assertions, he did not simply receive information and print it, Mr. Roche, by his own stipulation, is the only person with knowledge of who disseminated a confidential court order in *violation* of Florida Statutes.

Further, here, unlike the circumstances in *Morgan,* the purposes served by maintaining grand jury secrecy were not defeated by the matters published by the reporter. In *Morgan,* the Court found that grand jury secrecy was necessary to a) prevent flight of the accused; b) protect witnesses giving testimony before the grand jury, and c) ensure grand jurors can deliberate and vote without fear of retribution; as the matters published by the reporter in *Morgan* defeated *none* of these purposes, there was no justification in requiring the reporter to disclose the source of his information.

In *Huffstetter,* the Florida Supreme Court found that the only public purpose served by the statute (violated by the reporter's source when disclosing the information) was a private interest in reputation, which interest was insufficient to overcome the reporter's privilege.

Here, however, the purposes served by maintaining the confidentiality of juvenile dependency and termination of

parental rights proceedings, i.e. protection of children from harmful publicity, *was* defeated by disclosure of the confidential court order. As it is well established this interest outweighs the media's interest in reporting a human interest story, *H.Y.T; Mayer;* thus, the trial court properly determined that Mr. Roche's privilege was inapplicable and ordered him to disclose his source of the order released in violation of Florida Statutes.

Finally, the State asserts this case is quite similar to *Morejon;* contrary to Mr. Roche's assertion that he did not observe potentially criminal conduct, i.e. disclosure of a confidential court order, released in violation of an express statutory proscription, conduct punishable as indirect *criminal* contempt. Clearly this is very close the situation in *Morejon.* Appellant distinguishes *Morejon* from this case, arguing that in *Morejon,* there was no confidential source which would "dry up" if the reporter was required to testify, while here, apparently there is. Unfortunately for Mr. Roche, as argued here and below, notwithstanding the fact that Mr. Roche obtained a copy of the confidential order from a unidentified source, the media's interest in reporting news does not outweigh the public policy of protecting children from harmful publicity. Here, Mr. Roche received his information from a source he is not privileged to protect, not only because the source violated Florida Statutes in disclosing the information to Mr. Roche, but also because Mr. Roche's purpose is not to protect a source of information regarding an area of legitimate public concern, but rather he seeks to protect a source of information which is simply not a matter of public interest. *H.Y.T.*; *Mayer.* Thus, Mr. Roche, having failed to show how his interest in protecting his source outweighs the State's interest in protecting children, was properly held in contempt for failing to cooperate in the State's investigation by revealing the name of the person who violated Florida Statutes by disclosing confidential court documents to him.

3. Enforcement of the Subpoena Does Not Threaten The Public's Interest in Receiving Important News.

Appellant asserts that he is being punished for doing his job, that the material published by him did not produce harm, and that the public has a legitimate interest in these proceedings.

Appellant's argument overlooks the fact that both state and federal courts have recognized that there are limitations on a reporter's performance of his job, finding that there is not "an absolute right to an unimpeded flow of information in all places and all times." *Morgan* at 954. Mr. Roche is *not* being punished for doing his job, he is *not* being prosecuted for publication of this material; Mr. Roche is being punished for impeding the State's investigation into a violation of Florida Statutes and his willful refusal to obey a court order.

Appellant suggests that since the State did not show any harm to the child as a result of the information disseminated by him, he should not be punished for failing to obey the court's order. Again, his "no harm, no foul" argument begs the question; the issue is not whether anyone was hurt by publication of the material, the issue is whether he is privileged to protect someone who has disclosed information in violation of Florida Statutes. In *Morgan,* the purpose of the statute requiring grand jury secrecy were not defeated by the reporter's publication, thus he was not required to reveal his source, while here, the purposes of the statutes requiring confidentiality of juvenile court files, i.e. protecting personal matters of child custody, abuse, termination of parental rights from public disclosure, were defeated by publication, thus Mr. Roche is not privileged to refuse to disclose his source. Further, to suggest that some harm must be shown as a prerequisite to requiring disclosure of a reporter's source is ludicrous, such a test would result in there being

no protection to individuals from publication of improper matters, and no remedy from the harm as once the material has been published it cannot be unpublished. Such a suggestion is contrary to clearly established principles of law which recognize that the press does not have an unbridled right to access to information and would destroy the test annunciated in *Branzburg* used to *balance* constitutional interests versus societal interests. *Morejon; Morgan; Huffstettler.*

Finally, Appellant again argues that the State failed to show a compelling need for the information and that the news gathered was not a legitimate topic for publication. As previously argued by the State, it is well established that statutes, such as these, which make confidential matters concerning custody of children, abuse of children, termination of parental rights, are constitutional and the State's interest in protecting participants particularly children, in these proceedings from publicity, is paramount to the media's first amendment right to access to court proceedings. *H.Y.T.; Mayer; Florida Star v. B.J.E.*, 499 So.2d 883 (1st DCA 1986), rev'd on other grounds, ____ U.S. ____, 109 S.Ct. 2603 (1989), *Cape Pub. v. Hitchner,* 549 So.2d 1374 (Fla. 1989). Courts have made it clear these topics are *not* matters of genuine public concern, but of mere newsworthiness. *H.Y.T.; Mayer; Firestone v. Time,* 271 So.2d 745 (Fla. 1972).

It is equally well-established that a reporter's privilege does not extend to refusing to testify as to information needed in a criminal investigation, *Morgan; Morejon.* As the sections of Chapter 39 requiring that juvenile court files remain closed to the public and confidential, also provide that violation of these statutes is punishable by contempt, as Mr. Roche has stipulated that he is the sole source of knowledge as to who violated these statutes, and as he openly refuses to disclose the name of the person who disseminated the confidential court order, he cannot be heard

to complain that he has been held in contempt unfairly, his failure to reveal information needed in a criminal investigation cannot be tolerated.

CONCLUSION

WHEREFORE, based on the foregoing argument and authority cited herein, Appellee respectfully requests this Court **AFFIRM** the judgment and sentence below.

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

IN RE: INVESTIGATION
FLORIDA STATUTE, 27.04
SUBPOENA OF TIM ROCHE

Appellant,

vs.

Appellee.

CASE NO. 90-3071

L.T. CASE NO.
90-1290-CFA
Martin County

AN APPEAL FROM THE CIRCUIT COURT FOR MARTIN COUNTY

APPELLANT'S REPLY BRIEF

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II. ARGUMENT

As Appellee has recognized, a governmental body seeking to overcome the qualified journalists' privilege adopted by the Florida courts must provide evidence that the journalist possesses relevant information; that the government has exhausted all alternative sources for the information sought; *and* that forcing the reporter to reveal the information will serve a specifically identifiable and compelling state interest. *State v. Abreu,* 36 Fla.Supp. 2d 67, 16 Media L.Rep. (BNA) 2493 (Fla. 11th Cir. Ct. 1989). Here, while it has been stipulated that Roche possesses relevant information and that alternative sources for that information have been exhausted, Appellee has failed to articulate a specific compelling interest which would be served by forcing Roche to reveal the name of his confidential source. Instead, Appellee's arguments in favor of enforcement of the subpoena rest on misconstructions of settlement Florida law and a confusion of two separate and distinct First Amendment principles.

A. Appellee's Argument that Roche Enjoys No Privilege Is Not Supported By Florida Law.

Appellee's suggestion that Roche holds no privilege against disclosure here because he was a so-called "eyewitness" to the disclosure of information made confidential by state statute reflects a baffling misinterpretation of decisions by the Florida Supreme Court, including its recent holding in *Miami Herald Publishing Co. v. Morejon,* 561 So.2d 679 (Fla. 1990). There, a Miami Herald reporter witnessed the arrest of a purported drug smuggler at a public airport and published a news story describing what he had seen. Upon being subpoenaed by the drug smuggler, the reporter refused, citing the qualified journalists'privilege. In affirming the district court's refusal to quash the

subpoena directed to the reporter, the Florida Supreme Court *explicitly distinguished* its earlier rulings in *Morgan v. State,* 337 So.2d 951 (Fl. 1976) (in which a reporter had been subpoenaed to name the confidential source who had given her information regarding a sealed grand jury presentment *in violation of state law);* and *Huffstetler,* 489 So.2d 722 (in which a reporter had been subpoenaed to name the confidential source who had given him information regarding the filing of an ethics complaint *in violation of state law). See Morejon,* 561 So.2d at 580 [emphasis added] ("Unlike the factual situations in . . . *Morgan*[] and *Huffstetler, there is no confidential source involved in this case* which may 'dry up' is revealed. *The only source for [the journalist's] article was his own personal observations.*"); *see also Abreu,* 38 Fla.Supp.2d at 69, 16 Media L.Rep. (BNA) at 2494 (*Morejon* ". . . involved a journalist who witnessed the commission of a crime at the time of arrest, and *its holding should be restricted to its facts.*") [emphasis added].

Roche, of course, was *not* an eyewitness to a crime in the *Morejon* sense — the news article he wrote on the basis of the information supplied to him by the confidential source could not have been written from Roche's "own personal observations." Rather, like the reporters in *Morgan* and *Huffstetler,* Roche received from a confidential source information made secret by state statute, and, like the reporters in *Morgan* and *Huffstetler,* holds a privilege to keep the identity of that source confidential unless and until the state has proved that a specific and compelling interest will be served by the forced disclosure of the source's identity.

B. In Attempting To Create A Compelling Interest Where None Exists, Appellee Has Confused Two Separate First Amendment Principles.

In an attempt to portray the information to be gleaned from the forced disclosure of Roche's confidential source as sufficiently important to overcome the journalist's privilege Roche holds, Appellee has melded together, without legal support, two distinct areas of First Amendment jurisprudence.[12]

First, Appellee asserts that "it is well established that society's interest in protecting participants [in cases involving juveniles] from public scrutiny outweighs the media's interest in receiving news." Appellee's Answer Brief at 15. This is simply a misstatement of constitutional law. *See Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607-08 [emphasis partially supplied; partially added] (holding Massachusetts State law forbidding the press from attending rape trials during the testimony of minor victims unconstitutional because while "safeguarding the physical and psychological well-being of a minor" is a "compelling" interest, "it

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12 Appellee's misunderstanding of the distinctive components of First Amendment law is further evidenced by its assertion that:

> To suggest that some harm must be shown as a prerequisite to requiring disclosure of a reporter's source is ludicrous, such a test would result in there being no protection to individuals from publications of improper matters, and no remedy from the harm as once the material has been published it cannot be unpublished.

Appellee's Answer Brief at 27. When "improper matters" are published, individuals may bring suit for libel or invasion of privacy. They may *not,* consistent with the First Amendment, half the publication before it occurs. Moreover, Appellant's arguments regarding the lack of harm caused by the publication of Judge Kanarek's Order were made to show that here, as in *Morgan* and *Huffstetler,* the purposes of the statute rendering the order confidential already had been extinguished by prior events in this particular case. *See* Appellant's Initial Brief at pages 11-14.

does not justify a *mandatory* closure rule, for it is clear that the circumstances of the *particular case* may affect the significance of the interest.") More importantly, in making this flawed assertion, Appellee has confused two distinct areas of the law: access to courtrooms and the qualified privilege to withhold the identity of a confidential source. This confusion permeates much of Appellee's Answer Brief.

For example, in support of its argument that Roche's testimony regarding the identity of his source should be compelled, Appellee cites *In re Adoption of HYT,* 458 So.2d 1127 (Fl. 1984) and *Mayer v. State,* 523 So.2d 1171 (Fla. 2d 1988) — neither of which bears any legal or factual relationship to the issues now before this court.

In *HYT,* the constitutionality of a Florida statute mandating closure of all adoption proceedings was challenged by some members of the Florida news media on grounds that it impinged on the public's First Amendment right of *access* to court proceedings. No confidential source was involved in that case; and no Branzburg analysis was performed by the court.[13]

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13 *HYT* is further distinguishable in that the adoption proceedings underlying the media challenge followed a protracted custody dispute between an orphaned child's two sets of grandparents, of interest to the public because of " 'mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others . . .' " *HYT,* 458 So.2d at 1129, quoting *Firestone v. Time,* 271 So.2d 745, 748 (Fla. 1972). By contrast, the case underlying the subpoena here involved the parental rights of a mother who already had served a jail sentence for her participation in the beating death of another of her children — an issue that generated *genuine* public concern. *See* Appellant's Initial Brief at pages 1-3. To assert, as Appellee nevertheless does, that *HYT* stands for the proposition that "*any* impairment in the media's ability to report [on matters regarding legal proceedings concerning children] affects only matters of newsworthiness, not matters of real public or general concern" is to misstate the holding of that decision. Moreover, to then twist this misstatement into grounds for stripping Roche of his qualified privilege to withhold the identity of his confidential source is simply to ignore not only the facts of this case, but the explicit holdings of the Florida Supreme Court in *Morgan* and *Huffstetler.*

Similarly inapposite is *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988), in which a reporter was adjudged guilty of indirect criminal contempt for her decision to publish information she obtained while sitting in on a custody hearing which the trial judge later deemed confidential and closed to the public.[14] The reporter challenged the validity of the contempt order on grounds that the judge's decision to prohibit her from publishing what she had learned constituted an unlawful prior restraint. *Mayer,* 523 So.2d at 1173-74. As in *HYT,* no confidential source was involved and no *Branzburg* analysis performed.

Neither *HYT* nor *Mayer* have anything to do with the sole question facing this court: whether the State has shown that a compelling interest would be served by forcing Roche to disclose the identity of his source. Indeed, while these cases *may* stand for the proposition that "the State's interest in protecting children from harmful publicity takes precedence over the media's interest in assuring public *access to information* adduced in these proceedings," Appellee's Answer Brief at 23, that proposition is not before the court at this time.[15]

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14 The reporter in *Mayer* was permitted to attend the hearing on the condition that she would not publish what occurred there if the judge determined that her presence was prohibited. After the judge made that determination and notified the reporter of it, the reporter went ahead and published the information in contravention of her promise not to.

15 If Appellee's central argument is that the release of any information regarding the disposition of the Puffinberger parental rights termination case would be harmful, Appellant cannot understand why a copy of Judge Karanek's Order was provided *by the State* to a *press relations officer* of the Department of Health and Rehabilitative Services ("HRS"), Appellee's Answer Brief at 8, *citing* the Record on Appeal at page 19. Given this scenario, it appears likely that the state recognized early on that the Puffinberger case, *unlike the vast majority of such cases,* has aroused enormous public concern, and that this concern warranted the public dissemination of at least some information regarding the outcome of the termination hearing. Roche's article, which did no more than disclose that disposition, accomplished neither more nor less than a press release from HRS would have.

C. Appellee Has Failed To Identify Any Specific Compelling Interest Which Would Be Served By the Forced Disclosure Of Roche's Source.

In arguing that a generalized interest in maintaining the confidentiality of parental rights termination proceedings is a sufficiently compelling interest to overcome Roche's privilege to withhold the identify of his source, Appellee disregards clear Florida precedent to the contrary. *See, e.g., Morgan,* 337 So.2d at 955 [emphasis added] ("The preservation of the rule of secrecy in which some governmental activity has traditionally been enshrouded, is *not* the specific and substantial governmental interest necessary to defeat a reportorial source privilege.") Indeed, the types of interests which must be asserted before the privilege can be overcome are illustrated by the United States Supreme Court's decision in *Branzburg,* where the information sought from the reporters was crucial to "extirpating . . . traffic in illegal drugs, . . . forestalling assassination attempts on the President, and . . . preventing the community from being disrupted by violent disorders endangering both persons and property . . ." *Branzburg,* 408 U.S. at 701. No such interest has been asserted here.

Rather, Appellee's arguments in favor of forced disclosure are rooted in the insupportable premise that "a generalized interest in the protection of children is sufficiently compelling to overcome the First Amendment privilege here." Appellee's Answer Brief at 19. That premise is fundamentally flawed on a number of levels.

First, Appellee's argument mischaracterizes the central point of Appellant's case. Appellant does *not* challenge either the constitutionality or the validity of the Florida statute mandating that parental rights termination cases be conducted behind closed doors. Nor does Appellant anywhere suggest that protecting children from harmful publicity is not, *in general,* a socially beneficial interest. Instead, in accordance with Florida law, Appellant argues that such an interest —

under the *extraordinary circumstances* of *this* case — is not sufficiently compelling to warrant the abridgement of an important privilege based on the First Amendment. *See, e.g., Morgan,* 337 So.2d at 950: "We cannot accept the view that a generalized interest in secrecy of governmental operations should take precedence over the interest in assuring public access to information that comes to the press from confidential informants."

Second, Appellee has utterly failed to show a logical nexus between "protecting children from harmful publicity" and forcing Roche to identify his source. Given the enormous publicity surrounding the brutal death of her sister and the fact that *both* her parents were incarcerated for this heinous crime, it seems difficult to believe that the publication of portions of a judge's order terminating her mother's parental rights would by itself cause damage to Charlotte Puffinberger's self-esteem, as Appellee disingenously predicts. Appellee's Answer Brief at 19-20. Additionally, Appellant does not understand how forcing him to reveal the identity of his source in *this* case will "protect children from harmful publicity," since Appellant is certainly *not* advocating a wholesale abrogation by the press of confidentiality statutes. Indeed, had it not been for the widespread public concern over the welfare of Charlotte Puffinberger (which resulted *not* from publicity, as Appellee suggests, but, of course, from the fact that *her parents beat her sister to death)* the particular article at issue here would have had no reason to be written. Attempting to undo the horrible wrongs visited upon Charlotte by jailing a news reporter who wrote about them is both misguided and inherently disingenuous.

As Appellee points out, "[a]pparently Appellant is arguing herein that the State, having failed to show a compelling interest in obtaining the source of Mr. Roche's information, can show no purpose in pursuing contempt proceedings against Mr. Roche."

Appellee's Answer Brief at 23. That is, in essence, exactly what Appellant is arguing, precisely because that argument reflects the settled law of this jurisdiction. Absent proof that a specific compelling interest would be served by forcing Roche to identify his source — proof that exists nowhere in this case — Appellee has no right to pursue contempt proceedings against Appellant. The vigor with which Appellee has continued this pursuit, particularly in light of the fact that there is *no* Florida precedent to support its position, leaves Appellant with no choice but to speculate as to the underlying purposes of this lengthy litigation.

IV. CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this court reverse the judgment below and enter an order quashing the subpoena served on him in this case.

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT
Post Office Box A
West Palm Beach, Florida 33402

IN RE: INVESTIGATION
FLORIDA STATUTE, etc.

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

4DCA CASE NO.
90-3071

L.T. CASE NO.
90-1290-CFA
MARTIN COUNTY

MOTION FOR CERTIFICATION

This motion is respectfully submitted on behalf of Appellant, Tim Roche ("Roche"), pursuant to the controlling provisions of Rules 9.030 (a)(2)(A) and 9.330(a) of the Florida Rules of Appellate Procedure, as well as Article V, Section 3(b)(4) of the Florida Constitution. As well be discussed with greater particularity below, the central issue presented in this court's November 13, 1991, Opinion should be submitted as a certified question to the Florida Supreme Court.

I. THE NOVEMBER 13, 1991, OPINION

On November, 13, 1991, this Honorable Court rendered its Opinion in the above-styled cause, a copy of which is attached hereto as Appendix "A." In essence, that opinion held "that the purpose served by maintaining the confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's disclosure of the court order involved herein and that such action on his part was not qualifiedly privileged." *See* Opinion at p.8. In reaching this conclusion, this court considered the largely undisputed factual background of this case. As the court noted, the parties to this action are in agreement that, pursuant to the Florida Statutes, juvenile dependency proceedings are entitled to protection from public scrutiny. *See* Fla. Stat. §§ 39.411, 39.467. The parties are also in agreement that Roche was entitled to a qualified privilege to maintain the confidentiality of his source(s) of information pursuant to a myriad of federal and state authorities. The parties are not, however, in agreement concerning the applicability and controlling nature of two Florida Supreme Court decisions which Roche contends require reversal of the court below. *See Morgan v. State,* 337 So.2d 951 (Fla. 1976) [a copy of which is attached hereto as Appendix "B"]; *Tribune Co. v. Huffstetler,* 489 So.2d 722 (Fla. 1986) [a copy of which is attached hereto as Appendix "C"].

II. THIS COURT'S NOVEMBER 13, 1991, OPINION DEALS WITH AN ISSUE OF GREAT PUBLIC IMPORTANCE WARRANTING SUBMISSION TO THE FLORIDA SUPREME COURT OF A CERTIFIED QUESTION

Roche respectfully submits that the following question should be certified to the Florida Supreme Court as a matter of great public importance pursuant to the provisions of Rule 1.330(a) of the Florida Rules of Appellate Procedure:

> Whether, under the particular circumstances of this case, the State's generalized interest in maintaining the confidentiality of juvenile proceedings is sufficiently compelling to outweigh the grant of a qualified privilege to journalists to refuse to disclose confidential sources afforded by the First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution.

Roche submits that the aforestated issue is a question of great public importance. As this court stated in the opening paragraph of its November 13, 1991, Opinion:

> This case involved a consideration of the tension between the constitutional right of the public to unencumbered access to information from anonymous sources in the generalized governmental interests in protecting the secrecy of juvenile proceedings from public scrutiny. More particularly, the case focuses upon a determination of the priority of societal interests in requiring certain proceedings to remain confidential as opposed to a reporter's privilege against coerced disclosure of confidential sources.

See Opinion at p.1. As noted in this court's Opinion, the issue presented involved a clash between two areas of constitutional

and statutory law that are truly of great societal importance As this court stated in the November 13, 1991, Opinion, the State's interest in protecting the rights of children "has always been of primary importance and given preferential treatment by the courts of this land." *See* Opinion at p.7. In this case, the State's interest in maintaining the confidentiality of juvenile proceedings collides with the protections afforded journalists by the First Amendment to the United States Constitution and the corresponding protections of Article I, Section 4, of the Florida Constitution.

Additionally, this case presents a legal issue unresolved by the Florida Supreme Court. In the only two cases decided by the supreme court where a confidential news source was implicated (*Morgan* and *Huffstetler*), the supreme court decided that the journalist's qualified privilege outweighed what many regard as the most compelling governmental interest of all — the administration of criminal justice. As of this date, there are no Florida Supreme Court decisions with a holding unfavorable to a journalist which involve a confidential news source.[16] Should the supreme court hear this matter and render its opinion, it would undeniably clarify the parameters of a reporter's qualified privilege.

The district court's have routinely utilized certification of questions of great public importance to bring before the Florida Supreme Court issues which, by virtue of its limited discretionary jurisdiction, might otherwise escape the

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16 In both *Miami Herald Publishing Co. v. Morejon*, 561 So.2d 577 (Fla. 1990), and *C.B.S.,Inc. v. Jackson*, ___So.2d ___, 16 FLW S272 (Fla. April 25, 1991), the supreme court concluded that the factual situations presented did not implicate any confidential sources of information. In those decisions, the supreme court held that there is no qualified privilege which protects journalists from testifying as to their eyewitness observations or from producing physical evidence surrounding the arrest of a criminal defendant. This court expressly disavowed any reliance on *Morejon* in its November 13, 1991, Opinion. *See* Opinion p.6.

Supreme Court's review. *See, for example, Department of Health & Rehabilitative Services v. Yamuni,* 529 So.2d 258 (Fla. 1988); *Rasmussen v. South Florida Blood Service, Inc.,* 500 So.2d 533 (Fla. 1987); *Insurance Company of North America v. Pasakarnis,* 451 So.447 (Fla. 1984). Appellant respectfully submits that the question presented in the present case clearly warrants utilization of the certification process.

III. CONCLUSION

Based upon the foregoing discussion, Roche respectfully requests that this court certify the central issue in this case to the Florida Supreme Court as a question of great public importance pursuant to the provisions of Rule 9.330, Florida Rules of Appellant Procedure.

Respectfully submitted this 2nd day of December, 1991.

/s/

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MANDATE

from

DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Hugh S. Glickstein, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.
DATE: JANUARY 14, 1992

CASE NO.: 90-3071

COUNTY OF ORIGIN: MARTIN

T.C. CASE NO.: 90-1290 CFA

STYLE: IN RE: INVESTIGATION: FLORIDA
STATUTE 27.04 v. STATE

Marilyn Beuttenmuller, Clerk
District Court of Appeal
Fourth District

ORIGINAL TO: HON. MARSHA STILLER, CLERK

CC: Robert L. Lord, Jr.
Anne R. Noble
Attorney General — W. Palm Beach

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,295

IN RE: INVESTIGATION:
FLORIDA STATUTE 27.04
SUBPOENA OF TIM ROCHE

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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Explanation of References

A true and correct copy of the decision of the Fourth District Court of Appeal may be found in the appendix to this petition. References to that decision will be made by the notation "Op. at ___."

* * *

ARGUMENT

A. A Decision Holding That a Generalized Interest in Preserving the Secrecy of an Entire Category of Governmental Proceedings is Inherently Superior to a Reporter's Privilege Against Forced Disclosure of a Confidential Source Directly Conflicts with the Settled Law of this State.

Sixteen years ago, in *Morgan v. State,* 337 So.2d 951 (Fla. 1976), this Court unequivocally announced that Florida journalists could not be forced to disclose the identities of their confidential sources absent evidence that disclosure would serve a specific and compelling interest. There, this Court reversed a contempt conviction imposed on a reporter who had refused to identify the confidential source of information she published regarding the outcome of a closed grand jury proceeding. In overturning the conviction, and quashing the subpoena on which it was based, this Court rejected the Second District Court of Appeal's ruling that " 'preservation of the rule of secrecy in grand jury proceedings and . . . preservation of the integrity of the grand jury as an arm of the judicial branch government' " were *by themselves* compelling interest "outweighing . . . First Amendment considerations." *Id.* at 955, *quoting Morgan v. State,* 325 So.2d 40, 43 (Fla. 2d DCA 1975). Indeed, this Court explicitly held that the fact that a particular category

of governmental proceedings traditionally had been "enshrouded" in secrecy was *not,* by itself, evidence of "a specific, substantial interest" sufficient to "defeat a reportorial source privilege." *Id.* "A nonspecific interest, even in keeping the inner workings or the Pentagon secret, has been held insufficient to override certain First Amendment values." *Id.* Thus, this Court continued, "[w]e cannot accept the view that a *generalized interest in secrecy of governmental operations* should take precedence over the interest in assuring public access to information that comes to the press from confidential informants." *Id.* [emphasis added]. Contrary to the holding of the district court below, this Court placed *no* limitations on this absolute rule.

That no exceptions were intended was made clear by this Court a decade later, when it reaffirmed the explicit language of *Morgan* in *Tribune Co. v. Huffstetler,* 489 So.2d 722 (Fla. 1986). There, in reversing a contempt conviction entered against a reporter for his refusal to name the confidential source who disclosed to him records sealed by state statute, this Court again held that a *generalized* interest in the secrecy of governmental proceedings is "insufficient to override certain First Amendment values." *Id.* at 723-724, *quoting Morgan,* 337 So.2d at 955.

In upholding the contempt conviction entered against Petitioner Roche below, the district court carved an unwarranted — and insupportable — exception to settled law. First, it misread *Morgan* and *Huffstetler* to stand for the proposition that "a generalized interest in the secrecy of government operations should not *ordinarily* take precedence over the interest involved in assuring the public access to information that comes to the press from confidential sources." Op. at 7 [emphasis added]. Neither *Morgan* nor *Huffstetler* includes any such limitation. Second, on the basis of this misreading, the district court held that "the *generalized* governmental interests in protecting the secrecy

of juvenile proceedings" *by themselves* are sufficient to overcome "a reporter's privilege against coerced disclosure of confidential sources." *See* Op. at 1. As a result of this fundamental conflict with the Court's prior decisions, discretionary review should be granted.

B. The Decision Below Expressly, and Wrongly, Construes Provisions of the Federal and Florida Constitutions.

Both this Court and the United States Supreme Court have "made it clear" that the First Amendment mandates that *each* claim to privilege made by a journalist must be reviewed individually and " 'judged on *its facts* by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.' " *Huffstetler,* 489 So.2d at 723, *quoting Branzburg v. Hayes,* 408 U.S. 665, 710 (1972) (Powell, J., concurring [emphasis added]. Thus, "generalized" interests — which, by definition, fail to account for individualized fact patterns — have uniformly been held by this Court to be insufficient to overcome a reporter's privilege to shield the identity of a confidential source. *See Morgan,* 337 So.2d at 955 (generalized interest in secrecy of grand jury proceedings); *Huffstetler,* 489 So.2d at 724 (generalized interest in enforcing state laws).

Yet the court below failed to do any balancing at all, determining instead that a *generalized interest* in protecting "the privacy rights of minors" by itself "took precedence over the media's first amendment rights . . ." Op. at 8. In reaching this conclusion, the district court misconstrued the Florida and federal constitutions, explicitly relied on inapposite precedent, and implicitly relied on insupportable theories regarding the critical role of the media in important child abuse cases.

First, the district court determined that no balancing was necessary because "the interest in protecting the rights of children . . . has *always* been of primary importance and given preferential treatment by the courts of this land." Op. at 7 [emphasis added]. Yet the United States Supreme Court has rejected that proposition. *See, e.g., Globe Newpaper Co. v. Superior Court,* 457 U.S. 596, 607-08 (1982) (holding Massachusetts law forbidding the press from attending rape trials during the testimony of minor victims unconstitutional because, while "safeguarding the physical and psychological well-being of a minor" is a "compelling" interest, "it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the *particular case* may affect the significance of [that] interest") [emphasis partially supplied and partially added].

Moreover, in support of this flawed assertion, the district court confused two distinct areas of First Amendment law: access to courtrooms and the qualified privilege to withhold the identity of a confidential source. Indeed, rather than examining the facts of *this case* and the interests at issue within the context of those specific facts, as the First Amendment and Florida constitution require, the court below relied squarely on *In re Adoption of HYT,* 458 So.2d 1127 (Fla. 1984) and *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988) — neither of which bears any legal or factual relationship to the single issue of this case.

In *HYT,* the constitutionality of a Florida statute mandating closure of all adoption proceedings was challenged by the news media on grounds that it impinged on the right of access to court proceedings. No confidential source was

involved in the case; and no *Branzburg* analysis was performed by the court.[17]

Similarly inapplicable is *Mayer v. State,* 523 So.2d 1171 (Fla. 2d DCA 1988), in which a reporter was adjudged guilty of indirect criminal contempt for her decision to publish information about a child custody case that the trial judge had deemed to be confidential. The reporter challenged the validity of the contempt order on grounds that it constituted an unlawful prior restraint. *Mayer,* 523 So.2d at 1173. As in *HYT,* no confidential source was involved and no *Branzburg* analysis performed.

Neither *HYT* nor *Mayer* have anything to do with the sole question facing this Court: whether the State has shown that a specific and compelling interest would be served by forcing Roche to disclose the identity of his source. That the district court completely failed to comprehend what *was* at issue is made clear by the penultimate paragraph of its Opinion, where it stated:

> We conclude . . . that the purposes served by maintaining the confidentiality of juvenile dependency and termination of parental rights proceedings were contravened by Roche's *disclosure of the court order* involved herein and that *such action* on his part was not qualifiedly privileged.

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17 *HYT,* is further distinguishable in that the adoption proceedings underlying the media challenge followed a protracted custody dispute between an orphaned child's two sets of grandparents, of interest to the public because of " 'mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others. . . .' " *HYT,* 458 So.2d at 1129, quoting *Firestone v. Time,* 271 So.2d 745, 748 (Fla. 1972). By contrast, the case underlying the subpoena here involved the parental rights of a mother who already had served a jail sentence for her participation in the beating death of another of her children — an issue that generated *genuine* public concern.

Op. at 8 [emphasis added]. Roche never contended that his *disclosure of the Order* was qualifiedly privileged. What he asserted below, and asserts here, is that, under the First Amendment and the Florida constitution, he holds a qualified privilege to withhold the identity of the confidential source who disclosed the Order to him. This is an entirely separate question from the one answered by the District Court.[18]

Finally, the district court's decision reflects its misunderstanding of what actually would be accomplished compelled disclosure. As the *Morgan* Court noted, in factual circumstances nearly identical to those at issue here:

> These contempt proceedings were not brought to punish violation of a criminal statute and were not part of an effort to obtain information needed in a criminal investigation. *Their purpose was to force a newspaper reporter to disclose the source of published information, so that the authorities could silence the source.* The present case falls squarely within this language in the *Branzburg* plurality opinion: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."

337 So.2d at 956, *quoting Branzburg,* 408 U.S. at 707-08 [emphasis added]. There is no justification for the proceedings against Roche, and this Court should review and reverse the decision of the District Court.

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18 While *HYT* and *Mayer* may demonstrate, as the district court noted, that "the privacy rights of minors as protected by the statutes involved therein took precedence over the media's first amendment rights involved," Op. at 8, neither the statutes, nor the specific factual situations, nor the First Amendment rights involved in those cases are at issue here.

C. No Reason Exists in this Case for Departing from the Settled Law of this Jurisdiction Regarding the Journalists' Qualified Privilege.

The district court failed to articulate a legally cognizable reason for distinguishing between the interests served by keeping secret grand jury presentments *(Morgan)* or complaints filed with the ethics commission *(Huffstetler)* and those served by keeping secret the disposition of termination proceedings brought against convicted child abusers. There is none. The fact that a child was involved in the proceeding is not, in and of itself, sufficient reason for carving unworkable distinctions into long settled law. There is no credible evidence anywhere in the record of this case which suggests that the information disseminated by Roche caused any recognizable harm to either Charlotte May Puffinberger or to society in general. Moreover, American history is rife with examples of cases in which publicity about events concerning children has, as here, *benefited* both society in general and the individual child in particular.

In 1874, *The New York Times* published a series of article about Mary Ellen Wilson, a severely abused eight-year-old girl whose mother was indicted for neglecting and physically beating her. *See, e.g.,* "Mary Ellen Wilson, Further Testimony in the Case – Two Indictments Found Against Mrs. Connolly By The Grand Jury," *N.Y. Times,* Apr. 14, 1874, at p.1. That series — the first published account of child abuse in America — not only garnered enormous public sympathy for Mary Ellen (resulting in her adoption and a subsequently happy childhood) but also resulted in the formation of the Society for the Prevention of Cruelty to Children. *See* P. Stevens and M. Eide, "The First Chapter of Children's Rights," Am. Heritage, July/Aug. 1990, at p. 84.

More recently, publicity about the death of Bradley McGee (who had been returned to his abusive parents by court order

only to be murdered by his stepfather) refocused public attention on the rights of abused children, and let to public insistence on better protections for abused children. Public policy would seem to favor, rather than discourage, publicity about child abuse and child abusers.

CONCLUSION

For all these reasons, Petitioner respectfully requests that this Court review and reverse the decision of the court below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Fourth District Court of Appeal for the State of Florida

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BRIEF AMICUS CURIAE OF WFTV, INC., d/b/a THE PALM BEACH POST AND THE MIAMI HERALD IN SUPPORT OF PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
ARGUMENT	10
A. Mr. Roche Cannot be Punished for Publishing Portions of the Termination Order	10
B. This Case Illustrates the Use of a Subpoena to Unconstitutionally Sanction the Press for Truthful Publication	10
C. The Media in the State of Florida Continue to Be Punished and Harassed for the Publication of Truthful Information Despite this Court's Holding in *Florida Star*	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Anderson v. Dunn, 6 Wheat (19 U.S.) 204 (1821)	9
Branzburg v. Hayes, 408 U.S. 665 (1972)	11
Butterworth v. Smith, 494 U.S. 624 (1990)	9
Cohen v. Cowles Media Co., 111 S.Ct. 2513 (1990)	6
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	10,17
Democratic National Committee v. McCord, 356 F.Supp. 1394 (D.D.C. 1973)	11
Farr v. Pitchness, 409 U.S. 1243 (1973)	8
In re Investigation: Florida Statute 27.04, Subpoena of Roche v. State of Florida, 589 So.2d 978 (Fla. Dist. Ct. App. 1991), *pet. for rev. denied*, 599 So.2d 1279 (Fla. 1992)	6
In re Tierney, 328 So.2d 40 (Fla. 4th DCA 1976)	8
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	10,17
Miami Herald Publishing Co. v. Morejon, 561 So.2d 577 (Fla. 1990)	15
Morgan v. State, 337 So.2d 951 (Fla. 1976)	4
New York Times v. Sullivan, 376 U.S. 254 (1964)	10
Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977)	10,17
Shillitani v. United States, 384 U.S. 364 (1966)	9
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)	10,17
The Florida Star v. B.J.F., 491 U.S. 524 (1989)	2,10,15,17
Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986)	3-4

Table of Authorities Continued

	Page
United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973)	12
STATUTES:	
Fla.Stat. § 39.411	7,8,15
Fla.Stat. § 39.412	8
Fla.Stat. § 119.07(3)(d)	8
Fla.Stat. § 794.03	16
Fla.Stat. § 63.162(4)	17
Fla.Stat. § 775.15(2)(d)	8
ARTICLES AND PUBLICATIONS:	
Brechner Center of the University of Florida, *Preliminary Report on Survey Regarding Press Subpoenas in the State of Florida* (Sept. 21, 1992)	16
Ervin, *In Pursuit of a Press Privilege*, 11 Harv. J. on Legis. 233 (1974)	11
Langley & Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo.Wash. L.Rev. 13 (1988)	14
Reporter's Committee for Freedom of the Press, *Agents of Discovery: A Report on the Incidents Of Subpoenas Served on the News Media in 1989* (1991)	14
Swierzbinski, *The Newsperson's Privilege and the Right to Compulsory Process - Establishing an Equilibrium*, 48 Fordham L.Rev. 706 (1980) .	12
OTHER AUTHORITIES:	
"A Dirty Job, and Many Don't Want to Do It: Conflicts, Magnitude of Challenge and Potential for Press Limits Choices for Special Counsel to Probe Leaks," *The Recorder*, Nov. 8, 1991	11,13

Table of Authorities Continued

Page

"Adjourned Subpoena" *N.Y. Times*, Dec. 20, 1984, at A31, col. 5 13

Newsman's Privilege: Hearings on S.36, S.158, S.318, S.451, S.637, S.750, S.870, S.917, S.1128 and S.K.Res. 8, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93rd Cong., lst Sess. 553 (1973) 12

I. INTEREST OF AMICI CURIAE

Amicus WFTV, Inc., d/b/a The Palm Beach Post is a subsidiary of Cox Enterprises, Inc. and operates a television station in Orlando, Florida. WFTV, Inc. also publishes *The Palm Beach Post*, a daily newspaper of general circulation throughout the Palm Beach, St. Lucie, Martin, Okeechobee, Hendry, and Glade counties. *The Palm Beach Post* and the Orlando television station both cover local, state and national business, sports, industry, and judicial and governmental matters.

Amicus The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder, Inc., which publishes *The Miami Herald*, a daily newspaper of general circulation throughout the State of Florida. Knight-Ridder Inc. is a nationwide communications company engaging in the publication of magazines, books, and 28 daily newspapers.

As media broadcasters and publishers of daily newspapers, *Amici* are continuously involved in gathering and reporting the news about matters of public interest, including facts related to judicial proceedings. *Amici* have no financial interest in this case.

The Florida courts punished Petitioner Tim Roche not because he refused to reveal a confidential source, but because he accurately published the contents of a court order. *Amici* are extremely concerned about the effect the holding of the Florida Fourth District Court of Appeal will have upon the freedom of the press to report truthful information about issues of public concern legally obtained from government documents.

Mr. Roche's conviction, sanctioned by the Fourth District Court of Appeal, has far-reaching implications that extend beyond Florida's borders. Allowing states to punish the publication of truthful information from court documents legally obtained by the news media will, as this Court recently recognized in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), lead to "self-censorship." If states can punish truthful publication under the guise of their subpoena power, as Florida has done here, they will effectively gut the principle of *Florida Star*.

The decision below will necessarily have a chilling effect on the reporting of truthful information of public concern. Accordingly, *Amici* respectfully file this brief in support of Mr. Roche's Petition for Writ of Certiorari, and urge this Court to consider and resolve the serious and substantial federal question presented by the Petition.[1]

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case provided by Mr. Roche in his Petition, but wish to emphasize one important fact: the Florida courts improperly intermingled the question of a news reporter's qualified privilege not to reveal the identity of a confidential source with the question of a reporter's right to publish lawfully obtained official information about a matter of public concern.

At the time of Mr. Roche's publication, the ongoing story of the beating death of three-year-old Crystal

[1] *Amici* have obtained written permission from both parties to file this brief. Copies of the letters of consent have been filed with the Clerk in accordance with United States Supreme Court Rule 37.

Lynn McGrath, the prosecution of her parents, Carl and Cheryl Puffinberger, on charges of aggravated child abuse and neglect, the court-ordered termination of Cheryl Puffinberger's parental rights to Crystal's surviving sister, Charlotte May Puffinberger, and the alleged negligence and incompetence of the Florida Department of Health and Rehabilitative Services ("HRS") in connection with the Puffinberger case, had seized the full attention of the community. *See* App. to Petition at 30a-54a.[2] Regardless of how this case was litigated, *see* Petition at 15-20, the unmistakable fact is that the trial court and the Fourth District Court of Appeal each relied, at least in part (and perhaps entirely), on Mr. Roche's *publication* of the trial court order terminating Mrs. Puffinberger's parental rights (the "Termination Order") as the basis for holding Mr. Roche in contempt of court.

This case was not adjudicated as a case of "qualified privilege." The question of "qualified privilege" involves the determination of whether a reporter can be compelled to disclose the identity of a confidential informant or source. *See, e.g., Tribune Co. v. Huff-*

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[2] The Puffinberger case raised serious questions about the competence of HRS. As Mr. Roche points out in his Petition, *see* Petition at 4-5, HRS had been notified of the Puffinbergers' abuse of their child, Crystal, but did not take action to protect her before she was killed as a result of her parents' abuse on November 23, 1988. The community became outraged after learning that the State Attorney was not able to file murder charges against the Puffinbergers because no official was able to determine which parent dealt the fatal blows. *See* App. to Petition at 41a. At least partially as a result of the public pressure brought to bear in the Puffinberger case, HRS formalized its procedures for reviewing child abuse cases after receiving much pressure from the public. *See* App. to Petition at 25a.

stetler, 489 So. 2d 722, 722 (Fla. 1986) ("The issue is whether a reporter, subpoenaed in a state attorney's investigation, has a qualified privilege *against revealing the identity of a source* whose information violated [Florida law.]") (emphasis added). If the Florida courts in this case had only addressed whether Mr. Roche had a qualified privilege, they would have focused only on the identity of Mr. Roche's source and the State's need for such information.[3] But they did not. The Florida courts unconstitutionally based their findings of contempt not on the need to identify the source of the "leak," but on Mr. Roche's initial publication of the Termination Order.

For example, in denying Mr. Roche's motion to quash the subpoena, the trial court faulted Mr. Roche for publishing parts of the Termination Order:

> At this point, if the respondent, Roche, felt aggrieved at the procedure, believed the statute [Fla. Stat. § 39.411] and the Kanarek order unconstitutionally violated the qualified privilege of the press under the First Amendment and that he should not be barred from possession and knowledge of the contents of any order issued, he could immediately address his grievance to Judge Kanarek and if he received an unfavorable result, the Fourth District Court of Appeal is not distant either geographically or procedurally to address his

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[3] *See generally Morgan v. State*, 337 So.2d 951, 955 (Fla. 1976) ("In deciding whether petitioner was privileged to refuse to disclose her source in the present case, we first consider the governmental interest sought to be advanced in compelling disclosure of the confidential informant's identity.").

> grievance. *Roche has shown no great urgency or need to have published the prohibited story* the next day and none appears.
>
> A balancing between the constitutional interest and societal interest as mandated by *Branzburg* indicates that the statutes in question and the Court order involved did not involve private interests or reputation but the protection of an important segment of our society and that integrity for the orders of the courts of competent jurisdiction is absolutely essential and that these interests *far outweigh the constitutional interest of Tim Roche in his publication of said order*[.]

App. to Petition at 13a-14a (emphasis added).[4]

The Fourth District Court of Appeal justified its affirmance of the trial court's adjudication of contempt by saying that Mr. Roche's "publication" was not privileged:

> We conclude, as did the trial judge, that the purposes served by maintaining the confidentiality of juvenile dependency and termina-

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[4] As noted in the Petition, the prosecutor argued to the trial court that Mr. Roche should be punished for publishing the contents of the Termination Order. *See* Petition at 10-11, 17-18. Since then, the State has steadfastly maintained that Mr. Roche's offense was the publication of the Termination Order. In its recent response to Mr. Roche's pending petition for clemency, the State argued that Mr. Roche "voluntarily violat[ed] the law" by "electing to publish[]" portions of the Termination Order, and that his punishment was justified as a result. *See* State of Florida's Response to Petitioner's Request for Waiver of Rules of Executive Clemency and Application for Executive Clemency (August 6, 1992) at 12.

> tion of parental rights proceedings were contravened by *Roche's disclosure of the court order involved herein and that such action* on his part was not qualifiedly privileged.

See In re Investigation: Florida Statute 27.04, Subpoena of Roche v. State of Florida, 589 So.2d 978, 981 (Fla. Dist. Ct. App. 1991) (emphasis added), *pet. for rev. denied*, 599 So. 2d 1279 (Fla. 1992); App. to Petition at 9a.

The orders below speak for themselves. There can be no question that the federal question posed by the Florida courts in their rulings and presently before this Court is whether Mr. Roche may be punished for publishing portions of a widely disseminated but confidential court order which he lawfully obtained. "It is irrelevant to this Court's jurisdiction whether a party raised below and argued [the] federal law issue that the state . . . court actually considered and decided." *Cohen v. Cowles Media Co.*, 111 S.Ct. 2513, 2517 (1990) (citations omitted).

That this truly is a case involving the punishment of a reporter's publication of lawfully obtained information, and not a case dealing with a reporter's qualified privilege to not disclose his confidential source, is further established by the statute that the State was purportedly trying to enforce. The ostensible purpose of the investigation that led to Mr. Roche being subpoenaed was to identify the person or persons who leaked to Mr. Roche a copy of the Termination Order. *See* App. to Petition at 101a (affidavit of Chief Investigator David Powers) (the "investigation has been directed toward finding the source of the 'leaking' of the confidential order to Tim Roche of the Stuart News"). The State supposedly wanted the identity of

that person or persons in order to determine whether such disclosure violated Fla. Stat. § 39.411. *See id.*[5]

However, as the record reveals, the State focused only on Mr. Roche's role in the matter and left other significant leads as to the leak unexplored. Although the State did interview various courthouse and HRS personnel, as well as other persons who might have had information as to the source of the leak, *see* App. to Petition at 64a-95a, the State did not follow up on important leads which it had discovered.[6] Instead, the State chose only to subpoena Mr. Roche and did not effectively pursue any investigations of other HRS personnel, attorneys, or parties who appeared to be promising sources of information for the case.

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[5] The relevant portions of § 39.411 are quoted on pages 2-3 of the Petition.

[6] For example, the State learned that courthouse employee Tammy Franklin had asked for, received, and taken home an unauthorized copy of the Termination Order. *See* App. to Petition at 67a. Yet, the State never asked her whether she had shown her copy to anyone or distributed other copies to those interested. Likewise, the State discovered that a Circuit Court supervisor, Julie Ann Roddenberry-Sherman, also obtained a copy of the Order although she lacked authorization to review it. *See* App. to Petition at 68a. Again, the State did not follow up on this lead or attempt to find out whether Ms. Roddenberg-Sherman discussed the Order with others, shared her copy, or made additional copies.

Furthermore, the State's investigators did not pursue the identity of the HRS employee who they learned made two copies of the facsimile of the Order when it was received in West Palm Beach. *See* App. to Petition at 74a, 90a. Curiously, the State never found the missing facsimile. *Id.* For other examples of the State's cursory investigation, see Petition at 8-10.

A violation of § 39.411 is punishable as a contempt. *See* Fla. Stat. § 39.412. Under Florida law, any statutory violation punishable solely as a contempt has a one-year statute of limitations. *See* Fla. Stat. § 775.15(2)(d). As a result, the State's ability to punish *anyone* for disclosing the contents of the Termination Order to Mr. Roche terminated on May 29, 1991, over a year ago; the State's investigation as to the violation of § 39.411 is closed and the State can have no further purpose or interest under that statute in holding Mr. Roche in contempt of court. A further indication that the investigation of the § 39.411 violation is closed is that the State has disclosed its criminal investigative materials to the public. *See, e.g.*, App. to Petition at 61a-100a. Under the Florida Public Records Act, Fla. Stat. § 119.07(3)(d), all "active" criminal investigative information is exempt from public disclosure.

Had the State only been interested in obtaining the identity of the source of the leak, it would have vacated Mr. Roche's contempt conviction because the statute of limitations for prosecuting the source has run. *See In re Tierney*, 328 So. 2d 40, 47 (Fla. Dist. Ct. App. 1976) ("The purpose for an adjudication of civil contempt with its conditional punishment during a given grand jury term vanishes with the demise of that grand jury. It makes little difference that the sentence or punishment was prevented by the contemnor's exercise of his right to appeal.").[7] The

[7] As Justice Douglas wrote in *Farr v. Pitchness*, 409 U.S. 1243, 1244 (1973) (sitting as Circuit Justice), this Court has held "that just as the power of Congress to commit a recalcitrant witness for civil contempt ends with the adjournment of that Congress, so does the power of the grand jury end when the

State's persistence in keeping Mr. Roche's contempt conviction alive and its repeated unabashed statements regarding Mr. Roche's publication[8] speak volumes about the State's real motivation for prosecuting Mr. Roche.

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grand jury's term expires." *See Shillitani v. United States*, 384 U.S. 364 (1966) (grand jury); *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204 (1821) (Congress). *Cf. Butterworth v. Smith*, 494 U.S. 624 (1990) (Florida statute prohibiting witness from ever disclosing testimony given before grand jury violates First Amendment insofar as it prohibits witness from disclosing his own testimony after grand jury's term has ended).

[8] On September 18, 1990, at a hearing on Mr. Roche's motion to quash the subpoena, for example, the prosecutor argued that Mr. Roche should be punished because he had received and published portions of the Termination Order:

> What we have here today, Your Honor, is if we allow the press to go behind Judges' orders, to go behind the Florida Legislature and disregard Chapter 39, they simply then can violate the Judge's order a t anytime they choose. *Publish the order because they feel it is in society's interest to publish what the Judge said they could not* [.]
>
> . . . [Mr. Roche and *The Stuart News*] elected to be the ones that could flaunt it in the papers saying it was sealed but *we got it anyway and we published it.* . . . That is serious because it damages the children of this State.

R. 52-53, 59 (emphasis added). During the same proceedings, the prosecutor argued that despite the fact that Mr. Roche received the contents of the Order, he should have challenged "the sealing of the order" before publishing it, "and . . . failed to do so." R. 59.

III. ARGUMENT

A. Mr. Roche Cannot be Punished for Publishing Portions of the Termination Order

Just three years ago, in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), this Court once again held that the news media cannot be punished criminally or civilly for the publication of truthful information obtained by lawful means, absent a need to further a state interest of the highest order.[9] Yet the Florida courts below, by upholding his contempt conviction, punished Mr. Roche for publishing portions of a widely disseminated court order which he received lawfully. For the reasons set forth in the Petition, *Florida Star* requires that Mr. Roche's contempt conviction be set aside. *See* Petition at 20-30.

B. This Case Illustrates the Use of a Subpoena to Unconstitutionally Sanction the Press For Truthful Publications

Justice Black, in his concurring opinion in *New York Times v. Sullivan*, 376 U.S. 254, 295 (1964), noted that "it [is] possible to" use legal action as a "technique for harassing and punishing a free press." This Court later warned that

> [o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.

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[9] This Court had made similar rulings in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972) (plurality opinion). *See also id.* at 709-10 (Powell, J., concurring). Empirical evidence, legal opinions, treatises, and other major newsworthy events have illustrated that government officials have used and continue to use the press subpoena as a means of punishing the publication of sensitive information.

The use of press subpoenas as a means to harass or punish the press stems back to colonial times.[10] Such use of subpoenas to compel the disclosure of confidential sources and discourage aggressive reporting became a widespread problem when the press was informing the public on topics relevant to political decision-making in the late 1960s and early 1970s.[11]

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[10] As Mr. Roche noted in his Petition at 20 n.16, an early controversy in 1722 involved Benjamin Franklin's older brother, James, who was the publisher of the *New England Courant*. *See* Ervin, *In Pursuit of a Press Privilege*, 11 Harv. J. on Legis. 233, 234 (1974). Nearly a century later, in 1812, Congress issued one of its first contempt citations to Nathanial Rounsevell, an editor for *The Alexandria Herald*. *See* "A Dirty Job, and Many Don't Want to Do It: Conflicts, Magnitude of Challenge and Potential for Press Limits Choices for Special Counsel to Probe Leaks," *The Recorder*, Nov. 8, 1991, at p.2. Mr. Rounsevell had declined to disclose his source of a leak from an executive session of the House of Representatives. *Id.* In 1848, John Nugent, a reporter for the *New York Herald*, was held in the Capitol for one month by the Senate in an effort to force him to reveal his source for a story. *Id.*

[11] For example, reporters who published news reports regarding the investigation of the Watergate break-in were subpoenaed by the Committee to Re-Elect the President. A district court, however, quashed the subpoenas because the Committee had failed to demonstrate a compelling and overriding interest in the information sought. *Democratic Nat'l Comm. v. McCord*, 356 F.Supp. 1394, (D.D.C. 1973).

When the status quo was threatened by public knowledge of corrupt or inept government practices and policies, the normal tension between the government and the press intensified into bitter hostility. Press subpoenas became a government weapon aimed at restricting the press from acquiring and disseminating important information. *See* Swierzbinski, *The Newsperson's Privilege and the Right to Compulsory Process-Establishing an Equilibrium*, 48 Fordham L. Rev. 706, 706-07 (1980) (providing examples of the government's abuse of the subpoena power as a means to punish and intimidate reporters from disseminating truthful information).

The 1969 trial of the "Chicago Seven" provided a glimpse of the growing use of press subpoenas. The United States Government subpoenaed four major Chicago newspapers and three television networks for their notes, film footage, rough drafts, stories, and other materials connected with the Democratic Convention. *See United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

The frequency of press subpoenas increased during the Nixon administration. In the first 30 months of that administration, 30 subpoenas were served on *The Chicago Sun Times* and *The Chicago Daily News*, two-thirds of which were on the Government's behalf. *See Newsman's Privilege: Hearings on S.36, S.158, S.318, S.451, S.637, S.750, S.870, S.917, S.1128 and S.J.Res.8 Before the Subcommittee on Const'l Rights of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 553 (1973) (Statement of Rep. Abzug). One reporter was served in 11 separate proceedings within a year and a half. During the same two and a half years,

NBC and CBS were subpoenaed 124 times by federal and state prosecutors, as well as by defendants. *Id.*[12]

The passage of time has not lessened the zeal of government entities to use subpoenas in an attempt to muzzle the media. Recent public controversies provide disturbing examples of government officials attempting to punish publications through use of the subpoena power.

For example, reporter Tom Brandt of *The Washington Times* was subpoenaed and commanded to appear before the House Ethics Committee after revealing that Geraldine Ferraro was under congressional investigation for alleged violations of House financial disclosure rules. "Adjourned Subpoena," *N.Y. Times*, Dec. 20, 1984, at A31, Col. 5. After some editorials criticized the Senate's action and civil liberties groups objected, the Committee adjourned the subpoena and decided not to proceed with the contempt action. *Id.*

As some commentators have noticed, the vast majority of subpoenas seeking to compel the disclosure of confidential sources are nothing more "than a witch hunt." *See* "A Dirty Job, and Many Don't Want to Do It: Conflicts, Magnitude of Challenge and Potential For Press Limits Choices for Special Counsel to Probe Leaks," *The Recorder*, Nov. 8, 1991, at p. 2. These commentators contend that government officials conduct investigations such as the one involving Mr.

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[12] *Amici* have learned that Mr. Roche himself has received four subpoenas since 1990, three of which have been issued by the State Attorney's office prosecuting him in the matter before this Court.

Roche for reasons "that have nothing to do with finding a leaker." *Id.*

Each time a subpoena is issued against a reporter to compel disclosure of a source, "there is a significant risk that the motivation for the [subpoena] is not, or not only, enforcement of the criminal laws or vindication of reputation, but either punishment of the press for publishing the information, or exposure of the source for similar retributive purposes." Langley & Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo. Wash. L. Rev. 13, 18 (1988).

The danger to First Amendment freedoms posed by press subpoenas is illustrated in a recent study conducted by The Reporter's Committee for Freedom of the Press, a voluntary association of working reporters and editors dedicated to defending the First Amendment and the freedom of information interests of the news media. This study discusses the use of press subpoenas by state officials as a means to intimidate new organizations and discourage the publication of certain information. *See* Reporter's Committee for Freedom of the Press, *Agents of Discovery: A Report on the Incidents of Subpoenas Served on the News Media in 1989*, at 14-15 (1991). The report concluded that unbridled subpoena power either deters sources from divulging information or discourages reporters from publishing or gathering information of significant community concern. *Id.* at 15.

Amici bring the foregoing examples to the Court's attention in order to highlight the fact that the State's method of punishing Mr. Roche via subpoena in this case is not an uncommon or isolated phenomenon. Mr. Roche became the State's sole target for punish-

ment due to the Termination Order's publication and the State attempted to get around the clear mandate of *Florida Star* by issuing a subpoena, purportedly to compel disclosure of Mr. Roche's source. To this day, the State is pursuing the contempt conviction even though the applicable statute of limitations for the underlying violation of § 39.411 has run.

C. The Media in the State of Florida Continue to be Punished and Harassed for the Publication of Truthful Information Despite the Holding in *Florida Star*

Despite the clear holding in *Florida Star* in 1989, the media throughout the state of Florida continue to be burdened by lawsuits or subpoenas seeking to punish the reporters for publicizing truthful information which was lawfully obtained.[13]

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[13] The Brechner Center of the University of Florida is currently conducting a survey regarding the impact and widespread use of press subpoenas throughout the state of Florida. The Brechner Center distributed surveys to approximately 125 different media organizations in the State of Florida inquiring, among other things, about the frequency and types of subpoenas received from government officials and other entities. As a point of reference, the Brechner Center decided to focus on the number of subpoenas issued 21 months before and after the Florida Supreme Court's decision in *Miami Herald Publishing Co. v. Morejon*, 561 So.2d 577 (Fla. 1990) (upholding the contempt conviction of reporter who was an eyewitness to a public police search and arrest of a criminal defendant and who had refused to comply with a subpoena which compelled him to reveal the information he gathered during his observations). The Brechner Center wished to analyze the effect that this recent decision would have on government officials' use of press subpoenas.

Remarkably, in its preliminary findings, The Brechner Center found that since *Morejon* there has been a 70 percent increase in the number of press subpoenas issued to the different media organizations throughout the state of Florida. *See* Brechner Cen-

One recent example of government abuse of the media for publishing truthful information was the infamous case involving the alleged rape that occurred at the Kennedy estate in Palm Beach, Florida. During the investigation several media organizations, including *The New York Times*, NBC News and *The Globe*, a newspaper owned and published by Globe International, Inc., published the name of the alleged rape victim. Even though the victim's identity was already widely known in Palm Beach and had been published in a British tabloid available for sale on newsracks in Palm Beach, the State of Florida filed a criminal summons and information against Globe Communications Corp. (the parent company of Globe International, Inc.) charging it with two counts of violating Fla. Stat. § 794.03 for identifying the alleged victim of the sexual assault. The *New York Times* and NBC were also threatened with prosecution by the Palm Beach County State Attorney.

Remarkably, the statute that the State of Florida seeks to enforce against Globe Communications, Inc. is precisely the same provision which was at issue in *Florida Star*. After a three day evidentiary hearing, the motion of *The Globe's* to dismiss the summons and information was granted by the trial court. The State nevertheless has appealed the decision and the case is still pending before Florida's Fourth District Court of Appeal, the very tribunal that affirmed Mr. Roche's contempt conviction.

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ter of the University of Florida, *Preliminary Report on Survey Regarding Press Subpoenas in the State of Florida*, at 3 (Sept. 21, 1992) (available at The Brechner Center at the University of Florida). The Brechner Center is hoping to conclude its survey report by mid-October, 1992.

Another Florida example involves a pending invasion of privacy suit arising out of newspaper coverage of a custody battle between prospective adoptive parents and the child's biological father. On July 17, 1992, Mr. and Mrs. Kenneth Rosenblatt brought an action in Palm Beach County Circuit Court for invasion of privacy pursuant to Fla. Stat. § 63.162(4) against *The Lakeland Ledger*, a daily newspaper of general circulation. *The Lakeland Ledger* published a truthful news report about the case based in part on lawfully obtained information provided by a confidential source from court documents.

The Rosenblatts now seek to punish *The Ledger* for having published allegedly private information about the case obtained from the allegedly confidential court records. Again, the facts of this case seem peculiarly similar to those presented in *Florida Star*, *Oklahoma Publishing*, *Cox*, *Daily Mail*, and *Landmark Communications*, where this Court repeatedly held that the media could not be punished for the respective publications.

IV. CONCLUSION

The Fourth District Court of Appeal's decision in this case squarely conflicts with this Court's decisions holding that a State may not, absent an interest of the highest order, punish someone for publishing truthful information that is lawfully obtained. The State of Florida should not be permitted to ignore the holdings of cases like *Florida Star* by issuing a subpoena ostensibly to obtain the identity of a source but for the real motive of punishing the reporter for having published a story. Neither the State nor the Fourth District Court of Appeal have offered any jus-

tification for ruling that Florida's interest in punishing publications such as the one by Mr. Roche is of greater significance than the state interests asserted and found wanting in *Cox*, *Landmark*, *Daily Mail*, *Oklahoma Publishing*, or *Florida Star*.

Amici urge this Court to grant certiorari in this case and summarily reverse the ruling of the Fourth District Court of Appeal.

Respectfully submitted,

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No. 92-373

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGES

Table of Authorities ii

The First and Fourteenth Amendments to the United States Constitution prohibit the State of Florida from jailing a newspaper reporter for his refusal to identify a confidential source where the state has failed to demonstrate that a compelling interest would be served by coercing from the reporter his source's identity 4

A. A central purpose of the First Amendment is to encourage truthful news reports about the workings of government, and this purpose cannot be fulfilled where such reports can be used by the government as the basis for jailing news reporters 5

B. The overwhelming majority of state and federal jurisdictions recognize a qualified privilege permitting journalists to shield the identity of their confidential sources from the government absent evidence of a compelling governmental interest in the source identity 8

C. The state's attempt to portray this prosecution as a clash between the rights of children and the rights of news reporters ignores the fact that, in this particular case, those rights were intertwined 12

Conclusion 17

Certificate of Service 18

TABLE OF AUTHORITIES

CASES: PAGES

Bates v. Little Rock, 361 U.S. 516 (1960) 11

Branzburg v. Hayes, 408 U.S. 665 (1972) 2,4,7

Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374 (Fla. 1989) 3

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973) 8

Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) 2

Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975) 2

Craig v. Harney, 331 U.S. 367 (1947) 15

Desai v. Hersh., 954 F.2d 1408 (7th Cir.), cert. denied, 61 U.S.L.W. 3260 (U.S. Oct. 6, 1992) 8

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976) 8

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1962) 11

In re Grand Jury Proceedings, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd, 963 F.2d 567 (3d Cir. 1991)(en banc) 8

In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) . 16

In re Investigation: Florida Statute 27.04, Subpoena of Roche, 589 So. 2d 978 (Fla. Dist. Ct. App. 1991) 1,14

LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), cert. denied, 479 U.S. 818 (1986) 8

Miller v. Transamerica Press, Inc., 621 F.2d 721 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) 8

Mills v. Alabama, 384 U.S. 214 (1966) 6

Morgan v. State, 337 So. 2d 951 (Fla. 1976) 16

New York v. Ferber, 458 U.S. 747 (1982) 12

New York Times v. United States, 403 U.S. 713 (1971) 6

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6

Norris v. Alabama, 294 U.S. 587 (1935) 2

Pennekamp v. Florida, 328 U.S. 331 (1946) 16

Poe v. Ullman, 367 U.S. 497 (1961) 17

Roth v. United States, 354 U.S. 476 (1957) 6

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) . . 8

Sweeney v. Patterson, 128 F.2d 457 (D.C. Cir.), cert. denied, 317 U.S. 678 (1942) 6

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 11-12

The Florida Star v. B.J.F., 491 U.S. 524 (1989) 2

Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986) . . . 16

United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983) 8

United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied sub nom. Gopman v. United States, 482 U.S. 917 (1987) 8

United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988) 8

Whitney v. California, 274 U.S. 357 (1927) 11

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) 8

LAW REVIEWS:

A. Meikeljohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245 (1961) 5

Note, The Newsman's Privilege: Investigations, Criminal Prosecutions and Private Litigation, 58 Cal. L. Rev. 1198 (1980) 7

FEDERAL REGULATIONS:

Justice Department Guidelines, 28 C.F.R. § 50.10 9

Order No. 544-73, 38 Fed. Reg. 29588 (Oct. 26, 1973) 9

STATUTORY SHIELD LAWS:

Ala. Code § 12-21-142 (Supp. 1992) 9

Alaska Stat. § 09.25.150 - 09.25.220 (Supp. 1992) 9

Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1992) 9

Ark. Stat. Ann. § 16-85-510 (Supp. 1991) 9

D.C. Law No. 9-156 (1992). 9

Colo. Rev. Stat. §§ 13-90-119
and 24-72.5-103 (Supp. 1992) 9

Del. Code Ann. tit. 10, § 4320 (Supp. 1992) 9

Ga. Code Ann. § 24-9-30 (Supp. 1992) 9

Ind. Code § 34-3-5-1 (Supp. 1992) 9

Ken. Rev. Stat. § 421.100 (Supp. 1992) 9

La. Rev. Stat. §§ 1451-54 (West 1992) 9

Md. Cts. & Jud. Proc. Code Ann. § 9-112 (Supp. 1992) 9

Mich. Comp. Laws Ann. § 767.5a (West 1992) 9

Minn. Stat. §§ 595.021 - 595.025 (Supp. 1992) 9

Mont. Code Ann. § 26-1-902 (Supp. 1992) 9

Neb. Rev. Stat. §§ 20-144 - 20-147 (Supp. 1992) 9

Nev. Rev. Stat. § 49.275 (Supp. 1991) 9

N.J. Stat. Ann. § 2A:84A-21 (West 1992) 9

N.M. Stat. Ann. § 38-6-7 (Supp. 1992) 9

N.Y. Misc. Rts. & Immunities § 79-h (McKinney 1992) 9

N.D. Cent. Code § 31-01-06.2 (Supp. 1991) 9

Ohio Rev. Code Ann. §§ 2739.04,
2739.11 - 2739.12 (Page 1992) 9

Okla. Stat. Ann. tit. 12, § 2506 (West 1992) 9

Or. Rev. Stat. §§ 44.510 - 44.540 (Supp. 1992) 9

Pa. Stat. Ann. tit. 42, § 5942 (West 1992) 9

R.I. Gen. Laws §§ 9-19.1-2 - 9-19.1-3 (Supp. 1992) 9

Tenn. Code Ann. § 24-1-208 (Supp. 1992) 9

MISCELLANEOUS STATE STATUTES:

Fla. Stat. § 775.15(2) (Supp. 1992) 3

LETTERS, HISTORIES AND STUDIES:

4 Elliot's Debates on the Federal Constitution (1876) 4

N.Y.L. Rev. Comm., Report, Recommendations, and Studies, 1949 7

The Life and Selected Writings of Thomas Jefferson (Modern Library ed. 1944) 5

NEWSPAPER AND MAGAZINE ARTICLES:

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Mitchell Sets Rules Limiting Subpoenas Issued to Newsmen, N.Y. Times, Aug. 11, 1970, at A1 9

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No. 92-373

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

TIM ROCHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

In its Opposition to Petitioner Tim Roche's Petition for a Writ of Certiorari, Respondent, the State of Florida, has elected to abandon its policy arguments, mischaracterize the record below and all but ignore the significant constitutional principles threatened by its relentless prosecution of Mr. Roche.

A brief reply is therefore warranted.

The State's assertions to the contrary, the opinion of the appellate court at issue here, like the trial court order it affirmed, holds that Mr. Roche was properly convicted of indirect criminal contempt because his publication of portions of the Termination Order "was not qualifiedly privileged" and his publication "contravened" the "purposes served by maintaining the confidentiality of juvenile dependency and termination of parental rights proceedings." See In re Investigation: Florida Statute 27.04, Subpoena of Roche, 589 So. 2d 978, 981 (Fla. Dist. Ct. App.

1991), reprinted in Petition for Writ of Certiorari, Roche v. Florida, No. 92-373 ("Petition"), at 3a, 9a.

In short, as Mr. Roche has argued, Florida's Fourth District Court of Appeal did not address the issue of whether he held a constitutionally based qualified privilege to refuse to disclose the identity of a confidential source, but, instead, affirmed his conviction for contempt on grounds that he had no "privilege" to publish what he had learned. That holding, born of confusion and nurtured by the State's inattention to fact and reliance on inapposite case law, constitutes plain error.[1]

As Respondent's Opposition reveals, however, even if the Fourth District actually had affirmed Mr. Roche's conviction and jail sentence on grounds that he had refused to identify his source, review and reversal of that holding would be appropriate. For, at this last juncture, the State has abandoned any pretense of

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[1] Having denied making any such argument to any Florida court, the State, in its Opposition, admits that "a portion of Respondent's argument in the trial court was that publication of a confidential court order was improper. . . ." See Opposition at 6 (emphasis supplied by Respondent). Having instigated the confusion that led to the trial court's unconstitutional ruling and the appellate court's equally unconstitutional affirmance, see The Florida Star v. B.J.F., 491 U.S. 524, 541 (1989), Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 491 (1975), see generally Branzburg v. Hayes, 408 U.S. 665, 681 (1972)(noting that the cases presented there did not involve the imposition of "civil or criminal" penalties "related to the content of published materials"), the State should not now be permitted to argue that Petitioner's Question Presented was not argued in the courts below. See Opposition at 7. Moreover, the jurisdiction of this Court may be invoked where, as here, the ruling of a lower court violates the Constitution, whether or not that ruling is based on arguments that were "raised" by the parties below. See Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2517 (1991); see generally Norris v. Alabama, 294 U.S. 587, 590 (1935).

having a "compelling need" for the identity of Mr. Roche's confidential source, and has conceded that it seeks the identity of the source solely so that it can "rectify those procedures which unlawfully permitted disclosure of the confidential order to Petitioner." See Opposition at 12.[2] From Respondent's perspective, then, what appears to be at issue here is whether, consistent with the United States Constitution, the State of Florida may jail a news reporter for refusing to cooperate in its effort to track down an errant government employee and, presumably, secure his or her dismissal. No other remedial measures remain available to it.

This is not a case where the government seeks a news reporter's testimony for purposes of "[f]air and effective law enforcement aimed at providing security for the person and property

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[2] The State again asserts that it seeks the identity of Mr. Roche's source "in order to prosecute those persons . . . [who] unlawfully permitted disclosure of the confidential order . . . ." Id. However, as the State is aware, the statute of limitations for any purported crime committed by Mr. Roche's source (and no crime at all may have been committed) expired in May 1991 -- nearly two years ago. See Florida Statutes § 775.15(2) (Supp. 1992). Additionally, the State, for the first time, raises the suggestion that forcing disclosure of the identity of Mr. Roche's source will serve a purpose because "[w]hile it is true that one whose confidential records have been published does not have a cause of action against a newspaper who prints them, that person does have a cause of action against the person who discloses them. Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374 (Fla. 1989)." Opposition at 13 (emphasis supplied by Respondent). Even if Cape Publications could be read to stand for this proposition -- and Petitioner asserts that it cannot -- the State has no authority to invoke its prosecutorial power to create a purely private cause of action for some unidentified person who might pursue a civil remedy of an unidentified variety.

of the individual," Branzburg v. Hayes, 408 U.S. 665, 690 (1972),[3] but a case where a government seeks a news reporter's testimony for purposes of discouraging future reports about its own mistakes -- including those illustrating the lack of care with which state employees sometimes handle supposedly confidential records. As such, the holding below is antithetical to core values protected by the First and Fourteenth Amendments and should be reversed.[4]

> THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROHIBIT THE STATE OF FLORIDA FROM JAILING A NEWSPAPER REPORTER FOR HIS REFUSAL TO IDENTIFY A CONFIDENTIAL SOURCE WHERE THE STATE HAS FAILED TO DEMONSTRATE THAT A COMPELLING INTEREST WOULD BE SERVED BY COERCING FROM THE REPORTER HIS SOURCE'S IDENTITY

If, as Respondent's Opposition suggests, the question presented here is whether a news reporter must forfeit the

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[3] In routine forms filed with the Attorney General's office, the Assistant State Attorney in charge of this prosecution consistently has reported that the case involves no victim.

[4] As the General Assembly of Virginia recognized just seven years after the First Amendment was enacted:

> Let it be recollected . . . that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

4 Elliot's Debates on the Federal Constitution (1876), p. 575. Neither rigorous examination nor informed discussion can take place in an atmosphere where, as here, the acquisition and publication of information about the workings of government are permitted to form the predicate for the imposition of a penal sanction upon a news reporter.

protections guaranteed to newsgatherers by the First and Fourteenth Amendments simply because the truthful information he published came to him from a confidential source, then review of the decision below by this Court remains appropriate and reversal of that decision warranted.

A. A Central Purpose of the First Amendment is to Encourage Truthful News Reports About the Workings of Government, and This Purpose Cannot Be Fulfilled Where Such Reports Can Be Used by the Government as The Basis for Jailing News Reporters

From the earliest days of this Republic, Americans have depended on news reporters to bring them timely and complete information about the workings of their government. "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express." A. Meikeljohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245, 255 (1961). The most effective way of ensuring thoughtful self-government, the Founders recognized, was "freedom of the press." See The Life and Selected Writings of Thomas Jefferson 576 (Letter to Judge John Tyler, June 28, 1804)(Modern Library ed. 1944). Leaving the press free to examine the institutions of democracy, Jefferson reasoned, was essential to its preservation, and to the prevention of a government's ability to "manacl[e] the people with their own consent." Ibid. And, as this Court has recognized, whatever other objectives the authors of the First Amendment had in mind, its safeguards were "fashioned to assure unfettered interchange of ideas for the bringing about of

political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). Indeed, because a central purpose of the First Amendment is to "protect the free discussion of governmental affairs[,]" Mills v. Alabama, 384 U.S. 214, 218 (1966), the "Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people." New York Times Co. v. United States, 403 U.S. 713, 717 (1971)(Black, J., concurring).

That protection has been held to include protection from coerced disclosure of news sources, as well as protection from governmental censorship accomplished through criminal sanction.

Indeed, American courts traditionally have declined governmental invitations to punish members of the press for bringing information about governmental operations or failures to the attention of the community. See, e.g., New York Times, 403 U.S. at 714 (declining to prohibit publication of the Pentagon Papers); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)(declining, absent demonstration of actual malice, to impose civil penalties on newspaper for publication critical of public officials); see generally Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), cert. denied, 317 U.S. 678 (1942)("[c]ases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors").

In seeking to enforce the criminal penalty entered against Mr.

Roche, the State implicitly ignores the purposes served by this basic constitutional principle, and explicitly ignores the wisdom and experience of the American judiciary -- in Florida and elsewhere -- gained over the course of the past two decades. For, in recognition of the fact that much useful information comes to the press (and thus to the public) from confidential sources, and in response to the fact that American reporters are now the targets of thousands of subpoenas each year,[5] the majority of federal and state jurisdictions have held that fundamental constitutional interests are seriously threatened where, as here, a government fails to demonstrate that it has a compelling need for the identity of a news reporter's confidential source, but seeks to punish a reporter for refusing to identify his source nevertheless. As the United States Court of Appeals for the District of Columbia Circuit noted more than a decade ago:

> Compelling a reporter to disclose the identity

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[5] As this Court noted in Branzburg, "[f]rom the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished." 406 U.S. at 698-99. At the time Branzburg was decided, however, there was little empirical evidence to suggest that "federal and state authorities" would "'annex' the news media as 'an investigative arm of the government.'" Id. at 709 (Powell, J., concurring). See, e.g., Note, The Newsman's Privilege: Investigations, Criminal Prosecutions and Private Litigation, 58 Cal. L. Rev. 1198, 1200 (1980)(study showing that, between 1911 and 1968, the issue of a qualified privilege for journalists was raised only 17 times); N.Y.L. Rev. Comm., Report, Recommendations, and Studies, 1949, 25, 57-97 (study showing that, from 1886-1949, only 14 state court cases involved subpoenas issued to journalists). The same is not true today. See, e.g., W.A. Henry, When the Bench Uses a Club, TIME Magazine, Aug. 26, 1991, at 56 (reporting results of a study conducted in 1990, which showed that, in that year alone, American journalists were the targets of more than 4,500 subpoenas).

> of a confidential source raises obvious First Amendment problems. . . . Without an unfettered press, citizens would be far less able to make informed political, social and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.

Zerilli v. Smith, 656 F.2d 705, 710-11 (D.C. Cir. 1981)(citations omitted).

B. The Overwhelming Majority of State and Federal Jurisdictions Recognize a Qualified Privilege Permitting Journalists to Shield the Identity of Their Confidential Sources From the Government Absent Evidence of a Compelling Governmental Interest in the Source Identity.

As this Court, eleven federal circuit courts of appeal,[6] 29

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[6] The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits have recognized a qualified testimonial privilege for news reporters in a series of cases this Court has consistently refused to review. See, e.g., In re Grand Jury Proceedings, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd, 963 F.2d 567 (3d Cir. 1992)(en banc); Desai v. Hersh, 954 F.2d 1408 (7th Cir.), cert. denied, 61 U.S.L.W. 3260 (U.S. Oct. 6, 1992); United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied sub nom. Gopman v. United States, 482 U.S. 917 (1987); LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), cert. denied, 479 U.S. 818 (1986); United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Miller v. Transamerica Press, Inc., 621 F.2d 721 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). The Sixth Circuit rejected an absolute privilege in In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987), a case in which a television reporter possessed the sole evidence identifying the murderer of a Detroit police officer. As Judge Guy noted in his

state legislatures,[7] and the courts in 42 states[8] have recognized, "without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972).[9] Mr. Roche asserts that, if allowed to stand, the

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concurring opinion: "even if one applies the precise balancing test the dissent in Branzburg advocated, the result of that balancing commands disclosure. . . ." Id. at 588.

[7] The legislatures in the following states (listed alphabetically, and followed by the date of enactment) have enacted statutory shield laws granting news reporters some protection from compulsory process: Alabama (1935), Alaska (1967), Arizona (1937), Arkansas (1936), Colorado (1990), Delaware (1953), Georgia (1990), Illinois (1982), Indiana (1941), Kentucky (1952), Louisiana (1964), Maryland (1896), Michigan (1949), Minnesota (1973), Montana (1991), Nebraska (1973), Nevada (1971), New Jersey (1960), New Mexico (1973), New York (1970), North Dakota (1973), Ohio (1953), Oklahoma (1974), Oregon (1973), Pennsylvania (1937), Rhode Island (1971) and Tennessee (1973). The people of California have made their state's shield law a provision of the state constitution, and, late last year, the District of Columbia Council enacted a shield law for journalists working in the nation's capital.

[8] The reach of statutory shield laws has been tested in nearly every state where such a law has been enacted. Additionally, courts in thirteen states where no statutory shield law has been passed have recognized such a privilege as a matter of constitutional and common law. These are: Connecticut, Florida, Idaho, Iowa, Kansas, Maine, Massachusetts, New Hampshire, Vermont, Virginia, Washington, West Virginia and Wisconsin.

[9] The federal government also has recognized the importance of protecting news reporters from coerced disclosure of their news sources. In 1970, the United States Department of Justice promulgated guidelines, under which "reporters and photographers will not be subpoenaed unless the information is crucial and cannot reasonably be obtained elsewhere." See Mitchell Sets Rules Limiting Subpoenas Issued to Newsmen, N.Y. Times, Aug. 11, 1970, at A1. The guidelines focus on the balancing test that has been recognized throughout the federal and state judiciary. See Order No. 544-73, 38 Fed. Reg. 29588 (Oct. 26, 1973); T.B. Adamson, Shame on the Senate for subpoenaing reporters, Editor & Publisher, Apr. 4, 1992, at 64, 49. Binding on every federal government attorney, and applicable in both civil and criminal cases, the Justice Department guidelines have remained in effect, without substantial modification, for more than two decades. See 28 C.F.R. § 50.10.

decision below could accomplish this constitutionally pernicious end.

At issue here, according to the State, is a thirty-day jail sentence imposed on a newspaper reporter for his refusal to identify a confidential source, whose identity the State seeks solely so that it can "rectify those procedures which unlawfully permitted disclosure of the confidential order to Petitioner." Opposition at 12. Thus, taken literally, the State has imposed a criminal penalty on Mr. Roche for exposing the shoddiness of its record-keeping procedures to the community and for refusing to sacrifice a news source to a government unwilling or unable to correct its own systemic deficiencies.[10] Whatever interest the State may have in disciplining those in its employ, it is insufficient to overcome the basic constitutional interest -- shared by news reporters and the public they serve -- in receiving information about governmental activities. The State's interest here simply is not compelling: indeed, internal discipline can be effected by measures far less Draconian than the jailing of citizens not employed by the government.

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[10] In the entirely disingenuous arguments it presented to the trial and appellate courts, the State refused to concede that the real purpose of this prosecution was to secure the name of a person it believes to be a recalcitrant state employee, or, failing that, to punish Mr. Roche in that person's stead. As the record of this case makes clear, however, this is exactly what the State did, for the punishment imposed on Mr. Roche is the "punishment" mandated by Florida law for disclosures by state employees of the contents of judicial orders terminating parental rights. Thus, Mr. Roche is being punished for a crime he is legally incapable of committing, and is, in fact, being punished, in violation of the Constitution, for publishing information he lawfully obtained.

As this Court has held, where, as here, a "significant encroachment upon personal liberty" is threatened, "the State may prevail only upon showing a subordinating interest which is compelling." Bates v. Little Rock, 361 U.S. 516, 524 (1960)(citations omitted). The State should not be permitted to prevail here.

The record of this case speaks for itself. Had the State genuinely had a "compelling" need to "rectify" procedures, it has had ample opportunity to do so. Instead, the State has concentrated its efforts for the past 31 months not on rectifying its own procedures, but rather on the now entirely pointless prosecution of Mr. Roche. Indeed, there is no evidence anywhere in the record of this case -- and the State does not cite any -- that it has taken any steps whatsoever to punish or correct any of the behavior of its employees which it learned of during the haphazard investigation into the disclosure at issue here. Rather, the evidence is just the opposite: having learned of numerous real violations of the statute in which it purports to have a compelling interest, the State elected to ignore them and to focus its prosecutorial powers on punishing Mr. Roche.[11] The history of this litigation, in fact, is a history of a government's attempt to coerce silence about its operations, "the argument of force in its worst form." Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). See Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 558 (1962), quoting Sweezy

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[11] See Petition at 61a - 100a.

v. New Hampshire, 354 U.S. 234, 245 (1957)("'It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge on such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas * * * '"). Where, as here, "the power of compulsory process" has been neither carefully circumscribed, nor even fairly applied, review and reversal of any resulting contempt conviction is appropriate.

C. The State's Attempt to Portray This Prosecution As a Clash Between the Rights of Children and the Rights of News Reporters Ignores the Fact that, in this Particular Case, Those Rights Were Intertwined.

Until its Opposition, the State, throughout this prosecution, has characterized the interest to be served by forcing Mr. Roche to reveal the identity of his source as the protection of the privacy rights of Florida's children, and has implied that Mr. Roche's refusal to identify his source has somehow imperiled those rights. In its Response, the State plays lipservice to this argument, stating, correctly, that "the rights of children have always been of primary concern to the courts of this country" and noting that "'[a] democratic society rests for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.'" See Opposition at 13, quoting New York v. Ferber, 458 U.S. 747, 757 (1982) (citations omitted and emphasis supplied by Respondent). The State does not explain now, however, nor has it ever cogently explained, how forcing Mr. Roche to reveal the

identity of his source -- or jailing him for refusing to do so -- will aid Florida in fostering "the healthy, well-rounded growth of young people" in general, or Charlotte May Puffinberger in particular. Compare Branzburg, 408 U.S. at 710 (Powell, J., concurring)("the asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with regard to criminal conduct")(emphasis added).

This critical omission results from necessity. For there is no evidence anywhere in the record of this case to suggest that Mr. Roche's decision to withhold his source's identity has in any way endangered the privacy rights of Florida's children. By contrast, the record of this case demonstrates clearly that news reports such as Mr. Roche's -- which often can result only from the use of confidential sources -- can serve an interest critical to the "healthy, well-rounded growth" of children: that is, the interest they have in not being beaten to death while under the inattentive care of government agencies.

More importantly, the record of this case demonstrates beyond argument that, in this particular case, and with regard to the particular child at issue here, Mr. Roche's news reports accomplished exactly that purpose. See Affidavit of Jane Doe, Charlotte May Puffinberger's Former Foster Mother, reprinted in Petition at 26a - 29a.

For centuries, the rubric of "family privacy" has been used to shield from the spotlight of community attention the failures of

both society and government to protect some families' most fragile members from torture and death. Often, it has not been until news reporters have expended time and energy examining what really is going on in particular households or particular government institutions -- as opposed to what officials say is going on -- that changes are made or lives saved. See, e.g., Opposition at A-79 - 80. More often, reports come too late and necessary changes come only after the supervision of a case is transferred from a welfare agency to a prosecutor, or a victim of child abuse from the supervision of a protective services agency to the supervision of the county morgue.

As the record of this case demonstrates, important changes in the operations of Florida's Department of Health and Rehabilitative Services -- changes that perhaps could have saved the life of Crystal McGrath, Charlotte May Puffinberger's older sister, had they been instituted earlier -- were not made until Mr. Roche reported on the systemic failures that had contributed to Crystal's violent killing. See, e.g., Appellant's Initial Brief, In re: Investigation: Florida Statute, 27.04 Subpoena of Tim Roche (Fla. Dist. Ct. App. Feb. 11, 1991), at viii (T. Roche, Death blamed on HRS, The Stuart News, Apr. 18, 1989, at A1), xi (T. Roche, Probe: HRS criticized in girl's death, The Stuart News, Apr. 25, 1989, at A1). As the record of this case also demonstrates, it is the belief of Charlotte May Puffinberger's former foster mother that, far from harming Charlotte May in any way, Mr. Roche's news stories actually may have saved her life. See Petition at 26a - 29a.

Thus, underscoring the State's Response and its relentless prosecution of Mr. Roche is its abject refusal to acknowledge that significant public interests are not always served by myopic adherence to government's interest in secrecy.[12] It was, after all, not Charlotte May Puffinberger, nor anyone with standing to represent her, who instigated this prosecution. Rather, it was the judge presiding over the termination hearing who contacted the prosecutor's office and demanded that Mr. Roche be subpoenaed -- and he did so only after receiving a complaint from the losing lawyer. See Petition at 55a - 58a. Compare Craig v. Harney, 331 U.S. 367, 376 (1947)("the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion").

The contempt order against Mr. Roche may have been entered, as the State claims, "after consideration of the principles enunciated by this Court in Branzburg v. Hayes," see Opposition at 14-15, but, as the record of this case makes clear, those principles were misunderstood by the State and misapplied by the courts below.

As a consensus of American courts have recognized in the two decades since this Court announced its decision in Branzburg, where, as here, publication of information provided by a confidential source serves an important public benefit, the

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[12] This would seem to be particularly true where, as here, the news story at issue quoted from (but certainly did not criticize) a judge's order, and where the quoted portions of the order in question contained no information which had not already been made public by prosecutors and other state officials involved in the case. See Petition at 6, 30a - 54a.

interest asserted by the government to overcome a news reporter's privilege against forced disclosure of a source's identity must be weighty, indeed. And, as American courts consistently have held, neither the dignity of the bench, nor a government's interest in disciplining wayward employees constitutes such a "compelling" interest. See, e.g., Craig, 331 U.S. at 378 (reversing contempt convictions of newspaper publisher, editorial writer and reporter for publications criticizing trial procedures); Pennekamp v. Florida, 328 U.S. 331, 349-50 (1946)(reversing contempt convictions entered against newspaper and its publisher for publications criticizing actions of court); In re Grand Jury Proceedings, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd, 963 F.2d 567 (3d Cir. 1992)(en banc)(affirming quashal of federal grand jury subpoenas issued to news reporters aimed at discovering source of leak of government documents). See generally New York Times, 376 U.S. at 272-73 (citations omitted)("Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge of his decision").

In Florida, as in every other jurisdiction in America, the history of contempt is a history of reversal. See, e.g., Gibson, 372 U.S. at 558; Pennekamp, 328 U.S. at 349-50; Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986); Morgan v. State, 337 So. 2d 951 (Fla. 1976). No American news reporter in this century has been forced to serve a jail sentence for revealing to his community the deficiencies of its government -- or, indeed, for refusing to

identify the source of any information about those errors.

No reason exists why Mr. Roche should be the first.

CONCLUSION

As Mr. Justice Harlan observed three decades ago:

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bears arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Poe v. Ullman, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting from dismissal on jurisdictional grounds)(citations omitted).

Careful scrutiny of the decision below, as well as of the arguments made by the State in support of that decision, require its reversal.

For all of these reasons, Petitioner Tim Roche respectfully respects that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to **ROBERT A. BUTTERWORTH, JR., ESQ., Attorney General of Florida, The Capitol, Tallahassee, Florida 32399-0001** and **SARAH B. MAYER, ESQ., Attorney General's Office, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401** this 4th day of January, 1993.

Attorney